Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

INTERIOR/EXTERIOR SPECIALIST COMPANY, THE LLAMAS GROUP CORPORATION, AND RITO JULIAN LLAMAS,
Petitioners,

v.

TRUSTEES OF THE PAINTERS UNION DEPOSIT FUND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a settlement agreement entered into by the Painters Union in the NLRB concerning alter ego allegations preclude the Painters Union Deposit Fund from pursuing the same alter ego claim in federal court after the Fund acquiesced to the NLRB settlement and dismissed a prior federal lawsuit in reliance upon it?

2. Does the alter ego doctrine prohibit a finding that nonunion Llamas Group is an alter ego that can be held to all the provisions of union Interior/Exterior Specialist's collective bargaining agreement absent evidence that nonunion Llamas Group was a disguised continuance of union Interior/Exterior Specialist?

3. Does the alter ego doctrine prohibit a finding that nonunion Llamas Group is an alter ego of union Interior/Exterior Specialist when the two companies do not have "substantially identical" management, business purposes, operations, equipment, customers, supervision or ownership?

4. Does the alter ego doctrine prohibit a finding that nonunion Llamas Group is an alter ego of union Interior/Exterior Specialist absent proof of actual evasion of labor obligations or of any disguise intended to evade labor obligations?

PARTIES TO PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings are set forth in the case caption. Petitioner Interior/Exterior Specialist Company states that it is a privately held corporation. No publicly held company owns 10% or more of Interior/Exterior Specialist Company's stock. *See* Rule 29.6.

Petitioner The Llamas Group Corporation states that it is a privately held corporation. No publicly held company owns 10% or more of The Llamas Group Corporation's stock. *See* Rule 29.6.

Petitioner Rito Julian Llamas is an individual.

Respondent Trustees of the Painters Union Deposit Fund was a plaintiff-appellee below. Painters District Council No. 22 of the International Brotherhood of Painters and Allied Trades (AFL-CIO), which was a third-party defendant in the district court and an appellee below, is not a party to this appeal.

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The opinion of the United States Court of Appeals for the Sixth Circuit is reproduced at App. 1a. The opinion of the United States District Court for the Eastern District of Michigan is reproduced at App. 23a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its opinion on April 7, 2010. The Petitioners timely filed this petition and invoke this Court's jurisdiction under 28 U.S.C. §1254(1) (1998).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. §158(f) (1974) (reproduced at App. 107a)

29 U.S.C. §173(d) (1996) (reproduced at App. 108a)

29 U.S.C. §185 (1947) (reproduced at App. 109a)

STATEMENT OF THE CASE

I. IES and TLG have separate ownership, management and business purposes.

Mr. Rito Julian Llamas incorporated Interior/Exterior Specialist Company ("IES") on July 31, 1997. App. 26a. Mr. Llamas is the sole shareholder, officer and director of IES, and he runs its day-to-day operations. *Id.* IES performs industrial, selective demolition work and painting. *Id.* IES never performed design build, general contracting services,

or cleaning services. RE.152: p. 208. IES was a union contractor until it properly terminated the Painters Union collective bargaining agreement ("CBA") effective May 31, 2004. App. 26a.

Mrs. Julie Llamas incorporated The Llamas Group Corporation ("TLG") on March 30, 1999. *Id.* She manages TLG and is its sole shareholder, officer and director. *Id.*; RE.154: p. 55. TLG is a general contracting firm whose work includes design/build, concrete work, and masonry work. App. 27a. Prior to a May 21, 2004 Settlement Agreement, TLG also did some painting work. *Id.* TLG was never a signatory to a union contract. RE.154: p. 58. TLG focuses on private sector jobs, while IES focuses on public sector jobs. App. 27a. TLG and IES have different geographical territories, as TLG works in the metro-Detroit tri-county area (Wayne, Oakland and Macomb Counties, Michigan), and IES works from Toledo, Ohio to Marquette, Michigan. App. 31a.

II. IES and TLG have separate equipment.

IES and TLG have separate field equipment. App. 27a. They do not rent or lease equipment from each other, and they do not share office equipment such as copiers, computers, and telephones. *Id.* IES and TLG each pay for their own office supplies and computers, and they have separate automobiles, cell phone accounts, and storage facilities for equipment and materials. *Id.* Thus, IES and TLG have separate field and office equipment. App. 58a.

III. IES and TLG's supervisors are distinct.

The district court found that the IES field supervisors were different than the TLG field supervisors. App. 36a. Against this evidence, however, the district court concluded that the supervision factor weighed slightly in favor of an alter ego finding because "Mr. Llamas' occasional supervision of TLG projects undercuts this factor." App. 63a.

IV. IES and TLG's customers are distinct.

General contractor TLG's customers are normally owners. *See* RE.154: p. 53. Subcontractor IES's customers are general contractors, such as TLG. App. 36a. IES's customers, therefore, are TLG's competitors. *Id.* Other than projects where nonunion TLG properly subcontracted work to union IES, TLG and IES never worked on a job together and did not bid the same jobs. RE.154: pp. 49, 65. TLG took in revenue and paid IES for work that TLG subcontracted to IES. App. 36a. IES paid all requisite fringe benefits for work that TLG subcontracted to IES. RE.152: pp. 206-7. Certain customers are listed in the General Ledgers of both IES and TLG because TLG subcontracted work to IES on their projects. RE.154: pp. 71, 101; RE.152: pp. 195-7.

V. IES and TLG's operations are separate.

Mr. and Mrs. Llamas jointly own the Allen Road building from which TLG always operated. App. 27a. IES operated in Lincoln Park until late 2000 or 2001, and then moved to Allen Road, where TLG and IES each leased space. *Id.*; RE.152: p. 207; RE.154: p. 55.

IES pays all the office bills at the Allen Road location, and TLG pays IES a management fee, which covers its share of rent, utilities, snow removal, lawn care, building upkeep, repairs and upgrades. RE.154: pp. 9-10, 46-7, 55-6. The 2003 management fee was $106,254. RE.154: pp. 47-8; RE.152: pp. 152, 155. Accountants made sure TLG reimbursed IES for its share of these expenses. RE.154: pp. 55-6.

TLG and IES have separate bank accounts, lines of credit, vendor credit accounts, credit cards, federal employer identification numbers, corporate records, phone numbers, Internet domains, tax accounts for the State of Michigan and City of Detroit, unemployment accounts, worker's compensation insurance, and office personnel. App. 28a. They also have separate cell phone accounts, insurance policies, and storage facilities for equipment and materials. RE.152: pp. 204-5; RE.154: pp. 60-2.

From September 2001 to April 2005, IES wrote at least 10,000 checks. App. 28a. Besides Mr. Llamas, the two other signatories to the IES checking account were the IES office manager and Mrs. Llamas. *Id.* From September 2001 to April 2005, Mrs. Llamas signed only six checks for IES, all with Mr. Llamas's prior permission. RE.152: pp. 197, 199; App. 28a-29a.

From September 2001 to April 2005, TLG wrote at least 15,000 checks. App. 28a. Besides Mrs. Llamas, the only other signatory to the TLG checking account was Mr. Llamas. *Id.* Mr. Llamas signed only four checks for TLG during that period, all with Mrs. Llamas's prior permission and approval. RE.152: p. 199; RE.154: pp. 59-60; App. 29a. When the IRS audited TLG, the IRS concluded that there was

nothing wrong with TLG's tax returns from 2003 and 2004. App. 31a.

TLG and IES do not share employees. RE.154: p. 76. Out of IES's 250 to 300 employees, 14 painters performed work for both IES and TLG sometime before May 31, 2004. App. 30a. Six of the fourteen began working for non-union TLG, not IES, so the Fund would not have collected fringe benefits for their work. RE.154: p. 77. None worked for both companies at the same time. RE.154: pp. 77-80. After the May 2004 Settlement Agreement, TLG painters either went to work for IES or were laid off. App. 30a.

VI. IES and TLG entered into an NLRB Settlement Agreement concerning alter ego.

On August 21, 2003, the Union filed a Charge Against Employer with the NLRB against "Interior/Exterior Specialist d/b/a Llamas Group" (the "2003 Charge"), claiming:

> During the past six months, the above-named employer has been engaging in and operating an illegal double-breasted operation. This includes the employer failing to pay members union wages and fringe benefits owed to them under the contract.

RE.86-12: §2.

On February 12, 2004, the Fund filed suit to compel a comprehensive audit of IES's books and records, claiming that IES owed fringe benefits and liquidated damages to the Fund. RE.86-11: ¶¶13-14, p.5¶A.

On May 21, 2004, the parties entered into an NLRB Settlement Agreement concerning the 2003 Charge and agreed that TLG "will no longer serve as a painting contractor and will subcontract any painting work it might acquire to either Interior Exterior Specialists or to a contractor that has a labor contract with [the Union]." RE.86-15: ¶3. TLG, in reliance upon the Settlement Agreement, immediately subcontracted its painting work to IES. RE.86-5: pp. 16-17. Although TLG was not a CBA signatory:

> The Llamas Group, Inc. agrees that for any violation by it of [this Agreement] ..., it shall be directly responsible for the payment of union wages and benefits to any subcontractor's non-union painters.

RE.86-15: ¶5. As part of the settlement, the Union agreed to recommend that the Fund dismiss the 2004 Lawsuit. RE.86-15: ¶2. The Fund agreed and the dismissal order for the 2004 Lawsuit referred to "the parties ... having entered into an agreement with one another as to settlement of said issues." RE.86-16: p. 1. The only agreement was the NLRB Settlement Agreement.

IES and TLG complied with all terms and conditions of the NLRB Settlement Agreement. RE.154: p. 67; RE.158: p. 98. Robert Kennedy (the Union's business manager, secretary and treasurer) acknowledged at trial that all prior NLRB claims against IES and TLG were resolved up to the May 21, 2004, Settlement Agreement. App. 41a; RE.156: p. 132; RE.158: p. 47.

VII. IES properly terminated the CBA effective May 31, 2004.

The district court concluded that IES properly terminated the CBA effective May 31, 2004, through its March 23, 2004, letter. App. 48a, 103a. The court found that the Union took adverse action against IES for leaving the Union even though it took no adverse action against other Union contractors who withdrew. App. 48a-49a. The district court also found the Union discriminated against IES because Mr. Llamas and his workers are Hispanic. RE.158: p. 100; App. 44a, 48a-49a.

VIII. The Fund's rules require the Union to request the audit, even though the Union was precluded by the Settlement Agreement from resurrecting the alter ego claim.

On December 14, 2004, the Fund's Trustees voted to conduct a comprehensive audit of IES. RE.152: pp. 72-3. A comprehensive audit can only be performed if the Trustees vote to conduct it. RE.152: p. 72. The Trustees can only vote to conduct a comprehensive audit if the Union requests it, and the Union can only request it if an employee lodges a complaint. App. 49a.

In December 2004, more than six months after IES properly terminated its union contract, Kennedy, who heads the Painters Union, requested the comprehensive audit of IES and TLG based on complaints filed by three IES employees, even though none of the complaints referenced TLG. App. 49a. Kennedy admitted that no Union member made any

alter ego charges against IES or TLG after the Settlement Agreement was executed. RE.158: p. 68.

In 2005, the Fund sued IES and TLG, reasserting the same claims from the 2004 Lawsuit.[1] Ironically, the Fund sued to enforce the Settlement Agreement. RE.29: ¶¶11, 22. Kennedy and the Fund had no evidence that TLG violated the Settlement Agreement. RE.156: pp. 132, 137-138; RE.152: p. 84.

Kennedy admitted that TLG was dragged into this lawsuit and the comprehensive audit because Kennedy was so mad that "I couldn't see straight" in December 2004 when he realized that IES was not staying in the Union after executing the Settlement Agreement. RE.156: p. 136; RE.158: p. 30. The district court acknowledged that it may not have been proper to audit TLG because no complaint was lodged against TLG in the post-settlement period. App. 49a; *see also* RE.158: p. 48.

IX. IES and TLG never evaded any Union obligations.

IES entered into a CBA with the Painters Union effective October 5, 1998. App. 26a. Although incorporated in 1999, TLG performed no painting work until 2001. RE.154: p. 54. TLG was not formed to evade any of IES's obligations under the CBA with the Painters Union. RE.154: p. 74.

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[1] Collectively, the claims and relief sought in the 2003 Charge and 2004 Lawsuit were identical to those brought by the Fund in the instant lawsuit. *Compare* RE.86-12, RE.86-11: p. 8 ¶¶A-D and RE.29: p. 8 ¶¶A-D. Both complaints sought fringe benefits from September 1, 2001. RE.86-11: p. 7 ¶14; RE.29: p. 5 ¶¶15, 17.

IES never violated the CBA subcontracting provision that prohibits a union signatory from subcontracting work to a non-signatory, and IES never subcontracted any work to TLG. RE.152: pp. 195, 206. Thus, IES never avoided or intended to avoid fringe benefits. RE.152: p. 206. The Fund has never identified a single project where IES ever subcontracted work to nonunion TLG. TLG properly subcontracted painting work to union IES for the Waterstone, Tecumseh, Genoa, L'anse Creuse, Niles Center, and Roosevelt High projects. App. 36a; RE.152: pp. 107, 109. IES always paid fringe benefits on these nonunion jobs, so the Union got more than it would have if TLG had subcontracted to a nonunion company. RE.152: pp. 206-7.

REASONS FOR GRANTING THE PETITION

I. The NLRB is rendered powerless if pension and welfare benefit funds can ignore the terms of an NLRB settlement agreement that amends the collective bargaining agreement relied upon by the funds to collect fringe benefits.

The Union settled all alter ego claims against IES and TLG in the NLRB on May 21, 2004, and after IES refused to re-sign a subsequent Union contract, the Union asked the Fund to pursue IES and TLG in court for the same alter ego claims. The entirety of the Sixth Circuit's decision concerning whether the Funds are barred from reasserting these settled claims is the following:

> The NLRB settlement between IES, TLG, and the Union does not bar the Fund's alter ego

> claims because those parties did not agree that IES and TLG were not alter egos or that IES and TLG did not owe additional fringe benefits. Moreover, because the Fund owes its beneficiaries an independent obligation to enforce contribution requirements, the Union probably could not foreclose the Fund's ability to file suit. *See Food Employers Council, Inc.*, 293 NLRB 333, 334 n. 2 (1989). Therefore, we uphold the district court's determination that IES and TLG were alter egos.

App. 11a.

In this single paragraph, the Sixth Circuit rendered the NLRB impotent to enter into any meaningful settlement of alter ego claims. It permitted the third party beneficiary Fund to ignore a settlement that alters the terms of the very CBA that empowers this same Fund to collect fringe benefits in the first place. So even though the Union and the NLRB agreed not to pursue TLG as an alter ego of IES under the CBA negotiated by the Union, the Fund was permitted to do so.

The Fund's suit against IES and TLG seeking a comprehensive audit to establish alter ego liability is even more outrageous given the fact that the Union itself provoked the Fund to re-assert these alter ego claims. Under the Fund's rules, the Fund cannot seek a comprehensive audit unless the Union requests it, and the Union can only seek a comprehensive audit if an employee first makes a complaint against an employer. The only employee complaints upon which the Union based its "request" for a comprehensive audit were made long after IES properly terminated

its CBA. So there was never a valid reason for seeking the audit or filing suit.[2] Thus, even though the Union knew that TLG never violated the Settlement Agreement, it requested that the Fund conduct a comprehensive audit so the Union could circumvent that agreement to punish IES for leaving the Union.

At least two courts have recognized and rejected union attempts to circumvent settlement agreements in this manner. *See Cement Mason's Union Local No. 592 Pension Fund v. Zappone*, 501 F. Supp. 2d 714, 722-23 (E.D. Penn. 2007) (union that lost jurisdictional dispute could not seek to enforce other rights under the same CBA); *Rhode Island Carpenters Annuity Fund v. Trevi Icos Corp.*, 533 F. Supp. 2d 246 (D.R.I. 2008).

> That there are legitimate ERISA claims that a fund may bring against employers ... does not mean that every action is legitimate. It is important to look behind the claim and examine whether the action is consistent with the fiduciary obligation of the fund administrators to protect the assets and interests of the fund and its program. So, the question here is whether this litigation legitimately pursued a benefit for or on behalf of the fund beneficiaries; or ... whether it was an action primarily (if not

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[2] Even the district court acknowledged that TLG should not have been sued. The district court found that no complaint was lodged against TLG in the post-settlement period, and that therefore, "it may not have been proper to audit TLG." App. 49a.

> exclusively) designed to benefit the ... Union at the employer's expense.

Id. at 252.

Once a union settles a claim in the NLRB, it cannot then compel the fund to pursue the same claim in a collection action. Otherwise, the NLRB is powerless. No employer will ever again settle an alter ego claim in the NLRB. Indeed, the Settlement Agreement alters the terms of the CBA, as it requires TLG either to subcontract future painting work to IES or a union company or to pay fringe benefits to its painters. Even the Fund admits that "because of the settlement agreement ..., TLG is bound by the provisions of the collective bargaining agreement." RE.86-4: ¶22.

The Sixth Circuit's decision permits the Fund to ignore this amendment to the CBA and instead enforce the original language. Under this reasoning, a fund could simply ignore any written change to a CBA that it disagrees with and instead seek enforcement of any earlier version that it prefers. But this is not the law. *See Operative Plasterers' & Cement Masons' Local #18 Annuity Fund v. J.P. Phillips, Inc.*, 573 F. Supp. 2d 1059, 1064 (C.D. Ill. 2008) (fund precluded from enforcing contribution provisions of CBA while ignoring provisions making unfavorable arbitration award binding).

Basic policies that control in an unfair labor practice context may not be disregarded by courts in a suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185 (1947). *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 256 (1974). "[Federal labor-management relations]

statutes reflect a decided preference for private settlement of labor disputes without the intervention of government." *United Paper Wonders Int'l Union v. MISCO, Inc.*, 484 U.S. 29, 37 (1987). "Final adjustment by a method agreed upon by the parties is ... the desireable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." Labor Management Relations Act, 29 U.S.C. § 173(d) (1996).

The NLRB has a longstanding policy favoring the "peaceful, nonlitigious resolution of disputes." *Indep. Stave Co.*, 287 NLRB 740, 741 (1987). "The purpose of ... attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them." *Wallace Corp. v. NLRB*, 323 U.S. 248, 253-4 (1944). The NLRB's standard procedures for formal hearings press this point by noting: "Adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations." Form NLRB 4668 (4-05) (available at *www.nlrb.gov/shared_files/OM%20Memo/2005/OM%2005_60%20NLRB%20Form%204668.pdf*). The Board could not function effectively if it could not dispose of the majority of cases through informal mechanisms, including settlements, without recourse to litigation. *The Courier Journal*, 342 NLRB 1148, 1149 (2004).[3]

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[3] According to the NLRB Office of the General Counsel,

> The Agency's effectiveness and efficiency in administering the [National Labor Relations] Act is greatly enhanced by its ability to effect a voluntary resolution of unfair labor practice cases, cases which, after investigation, are

> This policy can be effective, however, only if it brings closure to the settled disputes and repose to the parties. That means that, once their disputes have been finally settled, parties should not be able to circumvent settlement agreements by later attempting to revive those disputes.

Id.

The district court below stated that the Fund's consent was needed to make the Settlement Agreement binding, but it then found the Fund's consent did not make the Fund a party to the Agreement and did not make the Agreement binding on the Fund, citing *Bakery & Confectionery Union v. United Baking Co.*, 495 F. Supp. 170, 172 (W.D. Pa. 1980). App. 97a-98a. The *United Baking* case involved a settlement that specifically excluded "any questions involving ... pension matters." *Id.* at 171. In the instant case, the Fund's consent was obtained, and the Fund dismissed its 2004 lawsuit by referencing the settlement in the dismissal order. Incredibly, the Fund's Complaint in this matter sought to enforce the Settlement Agreement. Because the Fund is an

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> deemed worthy of prosecution ... Over the years, the Agency has achieved an excellent settlement record due to the efforts of Agency staff and the cooperation of the Bar ... Over the last 10 years the settlement rate has ranged from between 91.5% and 99.5%.

Memo GC 10-01, Dec. 1, 2009 (available at *www.nlrb.gov/research/memos/template_html.aspx?file=http://www.nlrb.gov/Shared_files/GC Memo /2010/GC 10-01 Summary of Operations FY 09.htm.*)

intended third-party beneficiary to the Settlement Agreement (as it alleges in the Amended Complaint), it is bound to its terms.

Under ERISA, undisclosed "side agreements" that deviate from the terms and conditions of a plan or CBA are not binding upon the trustees of the plan. *Central States, SE & SW Areas v. Transport, Inc.*, 183 F.3d 623, 628 (7th Cir. 1999); *McMillan v. Parrott*, 913 F.2d 310, 311-12 (6th Cir.), *on reh'g*, 922 F.2d 841 (6th Cir. 1990); *Central States, SE & SW Areas v. Behnke*, 883 F.2d 454 (6th Cir. 1989); *see also Michigan Elec. Employees Pension Fund v. Encompass Elec. & Data, Inc.*, 556 F. Supp. 2d 746, 765 (W.D. Mich. 2008). But a written NLRB settlement which the Fund admits to receiving and which it relied upon in dismissing its own prior lawsuit is not an "undisclosed side agreement;" instead, it is incorporated into the CBA that the Fund now seeks to enforce. Thus, the Settlement Agreement amends the CBA, and the Fund is bound to its terms.

A pension fund is merely a third-party beneficiary of a CBA. *Merrimen v. Paul F. Rost Elec., Inc.*, 861 F.2d 135, 139 n. 11 (6th Cir. 1988); *see also SW Admin., Inc. v. Rozay's Transfer*, 791 F.2d 769, 773 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987). A third-party beneficiary stands in the shoes of the promisee to enforce the promises of the promisor. *Koppers Co. v. Garling & Langlois*, 594 F.2d 1094, 1098 (6th Cir. 1979). A third-party beneficiary can have no rights greater than the promisee to the underlying agreement. *In re Tri-City Turf Club, Inc.*, 323 F.3d 439, 443-44 (6th Cir. 2003). Accordingly, the Fund has no basis for asserting greater rights under the CBA than the Union can assert. Thus, the

Settlement Agreement precludes the Union from suing IES and TLG for alter ego and also precludes the Fund from re-filing the NLRB alter ego claim under the guise of a district court claim for collection of fringe benefits. Because the Union cannot sue IES and TLG for alter ego, neither can the Fund.

Finally, NLRB decisions "establish the principle that a settlement, if complied with, will ... bar subsequent litigation of all prior violations ... except to the extent that they were not known to the General Counsel or readily discoverable by investigation ... or were specifically reserved from the settlement by mutual understanding of the parties." *Steves Sash & Door Co,* 164 NLRB 468, 473 (1967), *enforced as modified in other respects,* 401 F.2d 676 (5th Cir. 1968) (internal citations omitted). The Fund sued IES and TLG on an identical alter ego theory concerning the same period of time that the Union previously settled in the NLRB. Certainly Congress did not intend to permit pension and welfare benefit funds to circumvent NLRB settlements in this manner.

II. Contrary to the federal labor laws, the Sixth Circuit has declared "double-breasting" illegal.

The Sixth Circuit below reached the erroneous conclusion that "double-breasted operations" are illegal alter egos. App. 9a-10a. Double-breasting occurs where a union company establishes a second, nonunion company performing similar work in the same market with common ownership. *NLRB v. Fullerton Transfer & Storage, Inc.*, 910 F.2d 331, 336 n. 7 (6th Cir. 1990). Many courts have recognized the legality of double-breasting. *See C.E.K. Indus. Mech. Contractors, Inc. v.*

NLRB, 921 F.2d 350, 352 n. 3 (1st Cir. 1990); *Mass. Carpenters Cent. Collection Agency v. A.A. Bldg. Erectors, Inc.*, 343 F.3d 18, 22 (1st Cir. 2003); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 506 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983) (existence of union and nonunion firms historically operated side by side by a single employer is not a CBA violation); *A. Dariano & Sons, Inc. v. Dist. Council of Painters No. 33*, 869 F.2d 514, 517 (9th Cir. 1989); *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1469 (9th Cir. 1994), *cert. denied*, 516 U.S. 912 (1995).

Some courts have admonished unions that wish to preclude double-breasting to bargain for such arrangements. *Mass. Carpenters Cent. Collection Agency*, 343 F.3d at 22. But the Sixth Circuit's opinion erroneously concludes that alter ego liability attaches to a double-breasted entity. App. 10a.

> A double-breasted operation occurs when owners of one company that is a party to a labor agreement, own a second company that is non-union. The non-union company can bid more competitively on jobs that do not require union contractors, while the union company continues to bid on jobs requiring union contractors. This type of operation is not inherently illegal. In particular cases the NLRB has refused either to require the non-union and nonsignatory company to recognize the bargaining representative of the signatory company's employees or to apply the labor agreement to the employees of the non-union, nonsignatory company.

A. Dariano & Sons, Inc., 869 F.2d at 517 (emphasis added) (citing *Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1275 (9th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985)); *see also Local 627, Int'l Union of Operating Eng'rs. v. NLRB*, 595 F.2d 844 (D.C. Cir. 1979); *A-1 Fire Prot., Inc.*, 250 NLRB 217, 220 (1980), *aff'd on this issue sub nom. Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826 (D.C. Cir. 1982); *Frank N. Smith Assocs., Inc.*, 194 NLRB 212 (1971); *Gerace Constr., Inc.*, 193 NLRB 645 (1971).

"The NLRB has devised two related tests to determine when the practice of double-breasting is lawful: the single employer test ... and the alter ego test." *A. Dariano & Sons, Inc.*, 869 F.2d at 517. "[[I]t may be perfectly legal for a contractor to conduct business through a 'double breasted' operation, one in which the same contractor owns both union and non-union companies for legitimate business purposes." *Nor-Cal Plumbing, Inc.*, 48 F.3d at 1469.

Thus, the mere existence of double-breasted entities is not illegal or violative of a CBA; instead, the union or fund must also prove that the two entities are alter egos. Even the Painters Union concedes that "double-breasting" is proper. RE.83: p. 13. As such, the Sixth Circuit erred in finding that "[a]lter ego liability may apply to a new, non-union entity that is 'merely a disguised continuance of the old [union] employer," or to a 'double breasted operation.'" App. 9a-10a. Double-breasted operations are not inherently improper. Instead, the appropriate test, as set forth by the U.S. Supreme Court, is whether the nonunion entity is merely a disguised continuance of the union entity. *Southport Petroleum Co. v. NLRB*, 315 U.S.

100, 106 (1942). Double-breasting is not evidence of alter ego.

Congress has considered and expressly rejected amendments to the labor laws to prohibit double-breasting in the construction industry. In 1986, the House passed an amendment to the Construction Industry Labor Law Amendments of 1985, which contained language that would prohibit double-breasting or dual shops in the construction industry. H.R. 281, 99th Cong. (1986). The bill did not pass the Senate. S. 2181, 99th Cong. (1986). Similar language was introduced in the Senate in 1987, but the bill did not proceed from the committee level. S. 492, 100th Cong. (1987). In reference to H.R. 281, Senator Orin Hatch (R. Utah) explained:

> [I]t would eliminate the court sanctioned practice of commonly owned but separately managed construction entities operating without regard to each other's collective bargaining obligations. Known as dual shop operations or double-breasting, this practice normally involves one entity which is unionized and one which is non-union. HR 281 would destroy this legal practice.

132 Cong. Rec. S5724-01, 23 (1986).

In rejecting the anti-double-breasting amendment, Congress has confirmed that double breasting is legal and does not violate the labor laws. The courts may not impose their judgment concerning what laws should be enacted when Congress has already spoken on an issue and specifically chosen what not to include. "It is not the appropriate function of the federal courts

to rewrite an act of Congress." *United States v. Youngstown Sheet & Tube Co.*, 171 F.2d 103, 111 (6th Cir. 1948). Even assuming that two entities such as IES and TLG are double-breasted (which they are not), double-breasting is not illegal.[4] Thus, to the extent that the Sixth Circuit's holding is based upon its view that double-breasting is illegal, it cannot stand.

III. The Circuits do not assess alter ego under the "disguised continuance" test set forth by this Court in *Southport Petroleum* and *Howard Johnson*.

It is well-settled that an employer can avoid a union contract by shutting down its operations entirely. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 273-4 (1965). In addition, §8(f) of the NLRA, 29 U.S.C. §158(f), specifically permits construction companies like IES to enter into and terminate union contracts. *See James Luterbach Constr. Co.*, 315 NLRB 976, 978-9 (1994) (employers with a §8(f) agreement have no obligation to bargain for a successor contract).

The alter ego doctrine was developed to prevent employers from evading collective bargaining agreements and labor law obligations by making "a mere technical change in the structure or identity of the employing entity ... without any substantial change in its ownership or management." *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S.

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[4] The district court found that IES and TLG have separate ownership, management, and business purposes. It never concluded that they are double-breasted.

249, 259 n. 5 (1974). This Court first considered an alter ego case in *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942), where an employer sought dismissal of an NLRB order to reinstate union employees because the employer had sold its assets to a second company. The Court found that the NLRB needed to adduce whether there was a "bona fide discontinuance and a true change in ownership – which would terminate the duty of reinstatement created by the Board's order – or merely a disguised continuance of the old employer." *Id.* at 106. Such a "disguise" was defined as "a disguise intended to evade" the Board's order. *Id.*

In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), this Court held that §301 of the LMRA, 29 U.S.C. §185 (1947), authorized the federal courts to develop a federal common law regarding enforcement of CBAs. But seventeen years later, it cautioned:

> *Lincoln Mills* did not envision any freewheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements. Rather, *Lincoln Mills* makes clear that this federal common law must be "fashion(ed) from the policy of our national labor laws."

Howard Johnson, 417 U.S. at 254 (quoting *Lincoln Mills*, 353 U.S. at 456). The Court outlined the major policy of the labor laws in *John Wiley & Sons v. Livingston*, 376 U.S. 543, 549 (1964): "the need to afford some protection to the interests of the employees during a change of corporate ownership."

Since these two decisions, however, federal courts around the country have developed a number of different ways to analyze whether in fact a nonunion entity is the "alter ego" of a union entity. At present, too many courts, including in the Sixth Circuit, disregard the definition that this Court set forth in 1942 – that an improper transaction is "a disguise intended to evade" labor obligations – claiming that this Court did not really mean what it said. As a result, the Circuits are wholly inconsistent concerning what a pension fund must establish in order to hold a nonunion entity to the CBA of a union signatory.

Many circuits start with the NLRB's seven-factor alter ego test that analyzes "whether the two enterprises have *substantially identical* management, business purpose, operation, equipment, customers, supervision and ownership." *Goodman Piping Prods., Inc. v. NLRB,* 741 F.2d 10, 11 (2d Cir. 1984) (emphasis added); *see also Trafford Distrib. Ctr. v. NLRB,* 478 F.3d 172, 176 (3rd Cir.), *cert. denied,* 552 U.S. 818 (2007) (considers "equipment and premises" as one prong); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.,* 690 F.2d 489, 507 (5th Cir. 1982), *cert. denied,* 464 U.S. 932 (1983); *NLRB v. Allcoast Transfer, Inc.,* 780 F.2d 576, 579 (6th Cir. 1986); *Iowa Express Distrib., Inc. v. NLRB,* 739 F.2d 1305, 1310 (8th Cir.), *cert. denied,* 469 U.S. 1088 (1984); *Bd. of Trs. v. Universal Enters., Inc.,* 751 F.2d 1177, 1184 (11th Cir. 1985); and *Fugazy Cont'l Corp. v. NLRB,* 725 F.2d 1416, 1419 (D.C. Cir. 1984).

Many courts mechanically determine alter ego status based on whether one, some, or most of these factors were met, forgetting that their goal is to determine whether there was a disguised continuance

or unlawful evasion. As a result, absurd outcomes such as the instant case occur, where a court's application of the seven-factor test results in an alter ego finding absent any "substantial identicality" as to any of the seven factors that the court proclaims are relevant.

IV. The Sixth Circuit upheld an alter ego finding absent proof of "substantially identical" management, business purposes, operations, equipment, customers, supervision or ownership.

The district court did not find IES and TLG to be "substantially identical" under even one of the seven factors set forth in *NLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331, 336 (6th Cir. 1990). Instead, the district court used a "flexible approach" to set forth its own watered-down "any similarity" standard, and the Sixth Circuit affirmed its decision.

A. The district court rewrote the alter ego test and erroneously concluded that IES and TLG were alter egos under its new lenient test.

The Sixth Circuit upheld an alter ego finding against IES and TLG even though the district court erred in applying the seven factor balancing test for alter ego. The test for alter ego is set forth in *Fullerton Transfer,* 910 F.2d at 336: "whether the two enterprises have *substantially identical* management, business purpose, operations, equipment, customers, supervision, and ownership" (emphasis added). But the district court rewrote the standard into a query as to whether two enterprises have *any similar*

management, business purpose, operations, equipment, customers, supervision, or ownership, and the court found alter ego liability by using this more lenient standard. Two companies with "substantially identical" features are nearly indistinguishable from one another. Two companies with "any similar" features may be entirely distinct. Not once did the district court conclude that IES and TLG were "substantially identical" under any of the seven criteria.

Using its more lenient "any similarity" alter ego standard, the district court found that the ownership, management and business purpose factors weighed against assessing alter ego liability, and it never reached a conclusion on the equipment factor, simply stating that "IES and TLG have separate field and office equipment." App. 63a. The court then erroneously found alter ego liability based upon "similarities" in the remaining three factors: operations, customers and supervision. In doing so, it relied heavily upon its conclusion concerning the "operations" factor, as the scales were tipped only slightly in favor of alter ego on the "customers" and "supervision" factors. App. 64a.

The district court thus erred in two ways: first, it used an alter ego standard that was too lenient, and second, it failed to balance the four factors that weighed against an alter ego finding against the three factors that weighed in favor of such a finding.

A district court cannot arbitrarily water down the alter ego test established by the NLRB and adopted by the Sixth Circuit. It also cannot single out only certain of the factors to consider. Essentially, the district

court chose three of the seven factors and concluded that IES and TLG were alter egos even though they were not "substantially identical" under any of these factors. The court found no "similarity" in IES and TLG's management, business purpose, ownership or equipment. However, it decided that IES and TLG failed to meet its watered-down "similarity" standard for the supervision, customers and operations factors. It never found that they were "substantially identical" under any factor.

B. The district court did not balance the four factors weighing against alter ego against the three factors it relied upon in concluding that IES and TLG were alter egos.

The district court's opinion relies in large part upon its conclusion that "similarities" in the two companies' operations weighed heavily in favor of an alter ego finding. Even if the district court had used the "substantially identical" test, as is required in the Sixth Circuit, "[n]o one factor is dispositive in determining whether the corporate form should be disregarded in a particular case." *Wilson v. Int'l Bhd. of Teamsters*, 83 F.3d 747, 759 (6th Cir.), *cert. denied sub nom. Gen'l Truck Drivers & Helpers Union Local No. 92 v. Wilson*, 519 U.S. 1041 (1996). For example, after a careful analysis of all seven relevant factors in *Roofers Local 149 Security Trust Fund v. Duane Smelser Roofing Co.*, 285 F. Supp. 2d 936 (E.D. Mich. 2003), the trial court found that even though the management factor weighed heavily in favor of an alter ego finding and the operations factor could go either way, summary judgment on alter ego was inappropriate because "a single alter ego factor is not

dispositive." *Id.* at 942 (citing *Wilson*, 83 F.3d at 759). In contrast to the district court below, the *Duane Smelser* court balanced its factual conclusions as to each factor and concluded on balance that alter ego was inappropriate.

Little guidance exists as to the application of the alter ego test. No court in the Sixth Circuit has specified how much weight to afford each factor, and specifically, what to do when one or more of the alter ego factors is not present. Instead of considering each factor in turn, the Sixth Circuit has declared that "no factor is controlling and all need not be present." *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 587 (6th Cir.), *cert. denied*, 549 U.S. 1019 (2006). No court can follow such a standard. Courts need guidance concerning the application of the alter ego doctrine so that they do not simply list those facts that support alter ego and ignore those facts that mitigate against it. Trial courts should be required to apply the facts to each factor in turn and then determine on balance whether the facts weigh in favor of or against a finding of disguised continuance and thus alter ego.

In the instant matter, however, neither the district court nor the Sixth Circuit has analyzed the facts to determine whether, on balance, the two enterprises have "substantially similar" management, business purpose, operation, equipment, customers, supervision and ownership. Indeed, if the current decision stands, the new test for alter ego in the Sixth Circuit is whether the two entities share "any similarity" in any of the seven factors, with no accompanying analysis of each factor. App. 1a-16a.

This result puts companies in greater jeopardy of being declared alter egos improperly. If the courts are to balance the seven factors, then any factor that is not present should weigh against a finding of alter ego. Unfortunately, courts in the Sixth Circuit find alter ego if a few factors are present, ignoring those factors that mitigate against alter ego status and disregarding the requirement that there also be a disguised continuance or some unlawful evasion. As a result, the application of this test is patently unfair to employers, particularly because, as here, a nonunion employer can be found to be an alter ego of a union signatory absent any proof that the two entities are substantially identical under any factor.

Unless the courts of the Sixth Circuit "strike a balance among each of the criteria," absurd results like the instant case will result. Often no balancing of pro- and anti-alter ego facts is performed. In the instant matter, rather than reversing the district court because it failed to analyze all seven factors and decide whether, on balance, the two entities were alter egos, the Sixth Circuit sanctioned the district court's new watered-down alter ego test (while acknowledging that the appellate court may have reached a different conclusion). App. 11a. This new test only requires proof that two entities have "any similarity" among the seven factors.

V. The Sixth Circuit's decision ignores this Court's requirement in *Howard Johnson* and *Southport Petroleum* that a nonunion alter ego be a "disguise intended to evade" labor obligations.

As this Court explained in *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 259 n. 5 (1974), employers may not evade labor obligations by making "a mere technical change in the structure or identity of the employing entity ... without any substantial change in its ownership or management." The question courts must consider is whether there was a "bona fide discontinuance and a true change in ownership – which would terminate the [labor law obligation] – or merely a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). *See also NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 579 (6th Cir. 1986). Such a "disguise" is "a disguise intended to evade" the labor obligation. *Southport Petroleum Co.*, 315 U.S. at 106.

The factors relevant to a finding of alter ego include "whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership." *Allcoast Transfer*, 780 F.2d at 579 (citations omitted). Courts are to "strike a balance among each of the criteria." *Id.* (citing *Nelson Elec. v. NLRB*, 638 F.2d 965, 968 (6th Cir. 1981)). Until recently, courts in the Sixth Circuit also considered whether there was any intent to evade union obligations. *Trs. of Resilient Floor Decorators Ins. Fund v. A&M Installations, Inc.*, 395 F.3d 244 (6th Cir. 2005). *But see Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571 (6th Cir.). *cert. denied*, 549 U.S. 1019 (2006); *Trs. of Detroit*

Carpenters Fringe Ben. Funds v. Indus. Contracting, L.L.C., 581 F.3d 313 (6th Cir. 2009), *cert. denied sub nom. LaSalle Group, Inc. v. Trs. of Detroit Carpenters Fringe Ben. Funds*, __ U.S. __ (2010).

A. The purpose of the alter ego doctrine is to prevent evasion of labor obligations.

In *Allcoast Transfer,* 780 F.2d at 581, the Sixth Circuit used the NLRB's seven-factor test to assess whether the NLRB properly found two entities to be alter egos. In doing so, it explained that the purpose of the doctrine was to "prevent employers from evading obligations under the Act." *Id.* at 582.

Subsequently, in *NLRB v. Fullerton Transfer & Storage Ltd., Inc.,* 910 F.2d 331 (6th Cir. 1990), the Sixth Circuit refused to apply the NLRB's seven-factor alter ego test when a union company's split into two companies occurred long before the NLRB ordered a backpay award. The *Fullerton Transfer* court explained that where no union obligations were avoided at the time of the separation into two entities, no corresponding benefit triggered alter ego obligations. *Id.* at 337. It concluded that alter ego would only be applied where a corporation attempts to limit liability by thwarting labor law obligations. *Id.* at 338.

Following the *Fullerton Transfer* reasoning, the Sixth Circuit expressly noted that evasion of labor obligations is the focus of the alter ego doctrine. *Resilient Floors,* 395 F.3d at 248. In considering whether double-breasted operations are prohibited by the labor laws, the *Resilient Floors* court concluded that where there is no proof that the relationship

between the alleged alter egos changed or caused the union to receive less than the full benefit of its CBA, alter ego is inappropriate. *Id.* So despite the fact that the two companies worked on many of the same projects, had the same customers, shared office and warehouse space in the same building, shared office equipment and staff, and answered each other's phones and assisted with payroll, they were not alter egos. *Id.* at 246.

But soon afterward, a different panel of the Sixth Circuit found that proof of intent to evade federal labor law obligations was not necessary before finding alter ego liability. *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 587-88 (6th Cir.), *cert. denied*, 549 U.S. 1019 (2006). It avoided reaching the same conclusion as the *Fullerton Transfer* case by limiting that case to its facts. *Id.* at 587. Incredibly, even though *Resilient Floors* was decided on January 5, 2005, and *Yolton* was not argued until December 6, 2005, the *Yolton* court made no reference whatsoever to *Resilient Floors*.

Three months after *Yolton*, a district court judge followed the *Resilient Floors* reasoning and noted that the Sixth Circuit has "categorically rejected application of the alter ego doctrine ... where a nonunion company establishes a union company and no preexisting labor obligations are disrupted." *Cement Masons' Pension Trust-Fund v. McCarthy,* No. 04-CV-74006-DT, 2006 WL 770444, at *4 (E.D. Mich. Mar. 24, 2006). Because the union company did not conceal its close relationship with the nonunion company, the union did not receive any less than that for which it bargained. *Id.* at *5.

Recently, the Sixth Circuit again limited the *Resilient Floors* case to its facts and instead decided that two companies could be found alter egos due to a "virtual mountain of evidence establishing the intermingling of the two companies." *Trs. of Detroit Carpenters Fringe Ben. Funds v. Indus. Contracting, LLC,* 581 F.3d 313, 317, 319 (6th Cir. 2009), *cert. denied sub nom. LaSalle Group, Inc. v. Trs. of Detroit Carpenters Fringe Ben.* Funds, __ U.S. __ (2010).

In the instant matter, the Sixth Circuit's alter ego analysis cited to *Allcoast Transfer* and *Detroit Carpenters,* but never even referenced *Fullerton Transfer* or *Resilient Floors.* As a result, in the Sixth Circuit, two employers can be found alter egos even if no labor obligations were ever evaded.

B. The Fund never established that IES and TLG evaded any labor obligations.

The district court never concluded that IES and TLG intended to evade CBA obligations, and specifically, it never found that IES violated the CBA's subcontracting clause or actually evaded any labor obligations. The Fund never provided the court with a subcontract or other documentation proving that IES ever subcontracted work to nonunion TLG. Instead, evidence at trial showed that nonunion TLG properly sent work to union IES, and that IES paid the Fund all requisite fringe benefits for this work. RE.152: pp. 206-7.

The district court noted that under the Sixth Circuit's standard set forth in *Allcoast Transfer,* 780 F.2d at 583, a court can infer intent to evade. App. 61a-62a. However, if no labor obligation was actually

evaded, it is inappropriate to infer "intent" to evade, for there is no resulting damage to the Union or Fund. If a party never evades its CBA, whether or not it intended to do so is irrelevant. Indeed, the overwhelming evidence is that nonunion TLG subcontracted work to union IES, so the Union received more in fringe benefits than it otherwise would have received. RE.152: pp. 206-7. As such, it was improper to infer any intent to evade.

Under the Sixth Circuit's requirements in *Resilient Floors,* 395 F.3d at 248, the Fund cannot maintain a cause of action under an alter ego theory unless it establishes that IES evaded pre-existing labor obligations. In that case, the Sixth Circuit affirmed summary judgment for the union/nonunion defendants even though the two companies worked on many of the same projects, had the same customers, shared office and warehouse space in the same building, shared office equipment and staff, answered each other's phones, and assisted with payroll. *Id.* at 246.

In finding that the defendant companies were not alter egos, the court explained:

> Resilient Floor disregards the fact that 'an intent to evade' preexisting obligations is 'clearly the focus of the alter ego doctrine.' *Cement Masons' Pension Trust Fund v. O'Reilly,* 664 F. Supp. 277, 279 (E.D. Mich. 1987); *see also Allcoast Transfer, Inc.,* 780 F.2d at 579 (applying the alter ego theory to 'prevent employers from evading obligations' under collective bargaining agreements). In the absence of some 'indication that the relationship between [the companies] has changed over the

> years or has caused the [union] to receive less than that for which it bargained,' there is no inequity that would justify a court's imposition of liability. *Mass. Carpenters Cent. Collection Agency*, 343 F.3d at 22 ('If the [union] wants to ensure that employers with whom it contracts are not or will not be part of a double-breasted operation, we see no reason why it cannot bargain for such an arrangement.').
>
> Our own court faced this same argument in a case with nearly identical facts to those presented here, in which an affiliate of Resilient Floor was the plaintiff, and we refused to apply the alter ego theory after concluding that there was 'no injustice, fraudulent intent, or need to protect employees from being deprived of anticipated benefits' that could justify an extension of the doctrine. *Resilient Floor Decorators Vacation Fund v. Contract Carpet, Inc.*, 70 F.3d 116, 1995 WL 611148 at *5 (6th Cir. Oct. 17, 1995) (unpublished). Because Resilient Floor has not alleged in the present litigation that [union] A&M concealed its close relationship with [nonunion] Carpet Workroom, and because there is no indication that Resilient Floor has not received the full benefit of its collective bargaining agreement with A&M, the application of the alter ego doctrine is inappropriate here as well.

Resilient Floors, 395 F.3d at 248.

Similarly, the relationship between IES and TLG did not cause the Fund to receive less than the Union bargained for under the CBA. As in *Resilient Floors*,

there has been "'no injustice, fraudulent intent, or need to protect employees from being deprived of anticipated benefits' that could justify an extension of the [alter ego] doctrine" to IES and TLG.

Unfortunately, the district court below believed the holding in *Allcoast* conflicted with *Resilient Floors*, and therefore, it ignored *Resilient Floors* and relied upon *Allcoast* for its conclusion that the court can infer intent to evade. App. 60a-62a. In fact, these two cases are not in conflict; *Resilient Floors* even references the prior *Allcoast* case. *Allcoast* is the seminal case in this circuit concerning successor corporation liability in the alter ego context. In contrast, *Resilient Floors* is the Sixth Circuit's primary case concerning alter ego liability of two co-existing companies – a "double-breasted" situation that the Union concedes is proper. RE.83: p. 13. Thus, proof of "intent to evade" preexisting Union obligations is the focus of the alter ego doctrine in an alleged double-breasted (rather than successor corporation) context. The instant case involves unproven allegations of double-breasting.

Where there is "no evidence that [an entity] was formed due to an 'intent to evade' preexisting contractual benefit obligations, under *Resilient Floors*, application of the alter ego doctrine ... would be inappropriate." *Cement Masons' Pension Trust-Fund v. McCarthy*, No. 04-CV-74006-DT, 2006 WL 770444, at *5 (E.D. Mich. Mar. 24, 2006). The *McCarthy* court denied summary judgment to the pension fund on its alter ego claim, concluding that "there is no factual basis for finding that the union received less than that for which it bargained when [the entity] signed the union agreement and agreed thereby to make

contributions to the union trust funds on behalf of its employees." *Id.* at *5.

Finally, even if the Fund could establish that TLG helped IES avoid some pre-existing union obligations, it is inappropriate to subject TLG's nonunion work to a union contract and require TLG to pay fringe benefits for such nonunion work. Instead, if the Union could show that IES subcontracted work to TLG (which it did not), IES would be responsible for paying fringe benefits under the CBA's subcontracting clause, which precludes a signatory from subcontracting to non-union companies.[5] Thus, because the Fund's remedies are set forth in the CBA, there is no basis for finding that TLG is an alter ego and making it a *de facto* union signatory. Therefore, this Court should grant this Petition to correct obvious errors in the Sixth Circuit's recent reasoning in alter ego cases.

---

[5] It is undisputed that TLG subcontracted work to IES, but IES never subcontracted work to TLG.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request the issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-1966

[Filed April 7, 2010]

TRUSTEES OF THE PAINTERS UNION DEPOSIT FUND,	)
Plaintiff-Appellee,	)
v.	)
INTERIOR/EXTERIOR SPECIALIST COMPANY, et al.,	)
Defendants-Appellants,	)
v.	)
PAINTERS DISTRICT COUNCIL NO. 22 OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES (AFL-CIO),	)
Defendant-Appellee.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: MERRITT, GIBBONS, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. In this labor relations appeal, Interior/Exterior Specialists Co. (IES), a Union painting contractor, and The Llamas Group (TLG), a non-Union general contractor, challenge the district court's decision that they are alter egos and therefore owe fringe benefits to a Union fund for both firms' painting work. IES and TLG also challenge the district court's conclusion that federal labor law preempts their third-party claims and counterclaims for defamation and the district court's denial of IES's third-party claims for discrimination and restitution. The district court, however, applied the correct legal standard for determining alter ego liability, and the district court's factual findings for alter ego liability are not clearly erroneous. In addition, because Union officials did not make the statements that allegedly defame IES and TLG with actual malice, IES and TLG's defamation claims fail. The district court also properly rejected IES's claim of discrimination based on IES's Hispanic ownership and IES's independent restitution claim.

I.

IES is a Hispanic-owned painting contractor founded in 1997, with Mr. Rito Julien Llamas as sole shareholder, officer, and director. In 1998, IES and Painters District Council No. 22 of the International Brotherhood of Painters and Allied Trades (the Union)

concluded a collective bargaining agreement (CBA) that requires IES to pay a set fringe benefit amount to the Painters Union Deposit Fund (the Fund) for every hour that IES painters work. If IES's payments are delinquent, IES must pay liquidated damages. IES officially terminated the CBA effective May 31, 2004. TLG was formed in 1999 with Mrs. Julie Llamas, Mr. Llamas' wife, as sole shareholder, officer, and director. TLG is a non-Union general contractor that does design, building, concrete, and masonry work. Until May 21, 2004, TLG also did painting work. In July and August 2003, after Union officials learned that TLG painters were doing a job that IES was supposed to perform, the Union picketed TLG's worksite with signs accusing TLG of paying unfair wages.

On August 21, 2003, the Union filed a National Labor Relations Board (NLRB) charge against IES "d/b/a" TLG. The Union alleged that for six months, IES and TLG had worked as an illegal double-breasted operation and failed to pay CBA-required wages and fringe benefits. In November 2003, IES employees complained that they were not receiving fringe benefit contributions, and the Union requested a comprehensive audit of IES. In February 2004, the Fund sued IES for alleged CBA violations and failure to pay fringe benefits, and sought a comprehensive audit of IES's books and records to determine the amount owed. On March 23, 2004, IES notified the Union that IES was terminating the CBA, effective May 31, 2004. On May 21, 2004, the Union agreed to drop its NLRB charge if TLG ceased painting work and IES placed a Union steward on two existing projects. The Union also agreed to recommend to the Fund that the Fund's suit against IES be dismissed without prejudice. The Fund dropped the lawsuit.

On September 16, 2004, after the CBA terminated under IES's notice and after an IES employee complained to the Union about his insurance, Tommy Thomas, the Union's Business Representative and Director of Organizing, told the project manager of IES's Patrick Henry Middle School worksite that IES was not paying fringe benefits. That day IES sent the Fund IES's June and July 2004 payroll report, two checks totaling $56,000, and a letter explaining that these monies were "being submitted in accordance to our Agreement dated May 21, 2004," the date IES, TLG, and the Union settled the NLRB charge, but that "these payments in no way reflect a desire to continue a contract or to extend the contract as per our letter dated March 23, 2004," the date IES purported to terminate the CBA. In December 2004, after another employee complained to the Union about his insurance, Thomas told the project manager at IES's Western Michigan University worksite that IES was not paying fringe benefits. That month the Union notified the Fund that IES had not paid fringe benefits, and the Union requested a comprehensive audit of IES.

In the present suit, the Fund alleges that TLG, as IES's alter ego, is bound by the CBA and that defendants[1] must pay delinquent fringe benefits and liquidated damages for all CBA-covered work performed or subcontracted by either firm before the CBA's termination. IES and TLG impleaded the Union. IES claimed that the Union's ordering of

---

[1] Mr. Llamas, as CBA guarantor, is also a defendant in the case and was found jointly and severally liable for delinquent fringe benefits and liquidated damages. He raises no separate claims.

comprehensive audits constituted discrimination under 42 U.S.C. § 1981 because the Union had not ordered audits of non-Hispanic companies with similar business practices. IES asserted defamation claims based on Thomas' statements to the project managers at Patrick Henry Middle School and Western Michigan University that IES was not paying fringe benefits. TLG asserted a defamation claim against the Union based on the picketing of a TLG worksite in July and August 2003. IES also sought restitution for overpayment of fringe benefits for periods following termination of the CBA. The district court denied cross-motions for summary judgment as to these claims and held a four-day bench trial.

At trial, Mr. and Mrs. Llamas testified that IES and TLG had separate equipment, office supplies, phone numbers, bank accounts, lines of credit, corporate records, and tax accounts. They also testified that the two firms had different business purposes—IES was largely a painting firm focusing on public sector work, and TLG was a general contractor focusing on private sector work. They also testified, however, that IES and TLG had at times loaned each other money, and had shared some projects, some employees, and an office building for which TLG paid IES rent and a management fee for services including upkeep and snow removal. In 2003, TLG paid IES a $106,254 management fee and $71,200 for equipment rental. Mr. Llamas testified that TLG wrote IES twelve checks totaling over $400,000 for unspecified reasons. Though Mrs. Llamas owned TLG and Mr. Llamas owned IES, both Mr. and Mrs. Llamas acknowledged having some authority over both firms' finances and receiving money from each firm until 2003. The Fund's auditor testified that numerous

monetary transfers between IES and TLG were identified as "accounts payable-trade," a term usually indicating an undocumented loan repayment or a subcontracting payment. The auditor also testified that Mr. and Mrs. Llamas appeared on the payroll of both IES and TLG until 2003.

In connection with IES's discrimination claim, Nikitas Balatzis, owner of a non-Union painting company, testified that the Union had seldom contacted him during his first ten years in business, and that, after he hired Hispanic workers, contact from the Union increased and he received a "barrage" of prevailing wage complaints. Robert Kennedy, the Union's business manager, acknowledged that Mr. Llamas had previously notified the Union that other Union painting contractors had related non-Union companies that gave them a competitive advantage over IES. Other Union contractors testified that they had related non-Union companies but the Union had not ordered comprehensive audits of their companies. These other contractors also testified that, to their knowledge, Union employees had not grieved their payment practices.

Kennedy testified that IES had placed a Union steward at the Patrick Henry Middle School worksite, a project IES started after the CBA's official termination date. Kennedy also testified that Union members working at that site complained to the Union that IES was not paying fringe benefits, and that when Kennedy approached Mr. Llamas about those complaints, Mr. Llamas stated that he would pay the benefits when the project's general contractor paid IES. Kennedy testified that Mr. Llamas told him for the first time in December 2004 that IES would not

remain a Union contractor and that Kennedy had requested a comprehensive audit of IES then because IES's decision had upset him. Thomas testified that he had believed in September 2004 that IES would remain a Union contractor despite IES's official termination of the CBA and failure to sign another Union contract. Kennedy indicated that other firms sent similar official termination notices but remained Union contractors after further negotiation. (This testimony, if accurate, substantially affects many issues in this case. It supports the Fund's and the Union's arguments that a notice of CBA termination was generally considered a technicality and not a true indication of the intention to go non-Union.)

In connection with IES's restitution claim, Mr. Llamas testified that he paid the June and July 2004 fringe benefits because the Union had shut down the Patrick Henry Middle School worksite in September 2004 and he wanted to enable his workers to return to work and finish the project. Mr. Llamas testified that he told Thomas in September 2004 that he felt these payments were extortion. The Fund's auditor testified that the June and July 2004 fringe benefit payments could not be used to offset the amount that IES would owe in this suit because IES did not pay those benefits in error. By contrast, the auditor testified that his estimate did provide offset for overpayments that occurred when IES erroneously paid fringe benefits for more hours than a particular painter had worked.

The district court found that IES and TLG were alter egos partially based on their operations:

> IES and TLG (1) have substantial undocumented/inaccurate inter-company

> transactions and financial records; (2) Mr. Llamas can sign checks for TLG, and Ms. Llamas can sign checks for IES; (3) Mr. Llamas appears on the payroll of TLG and Ms. Llamas appears on the payroll of IES; (4) Mr. Llamas has sometimes supervised TLG projects; [and] (5) IES takes care of many of the bills and maintenance for the building for an arbitrary management fee . . . .

The court also found that IES and TLG's finances were "pervasively intermingl[ed]," that IES and TLG's ownership and management, though technically different, were "not as [different] as would usually be the case between two distinct companies," and that their business purposes were "generally separate" but not " mutually exclusive." The district court therefore concluded that defendants were jointly and severally liable for delinquent fringe benefits and liquidated damages. The fringe benefit contribution amount is based on (1) hours worked by Union painters on both IES and TLG payrolls while the CBA was in effect and (2) the hours worked by non-Union painters who worked only for TLG while the CBA was in effect.

The district court found that IES's § 1981 discrimination claim failed because the Union would have ordered comprehensive audits of IES, regardless of IES's Hispanic ownership, due to employee complaints about IES's failure to pay fringe benefits. The district court found that the Union had not ordered comprehensive audits of other firms because their employees did not complain about their wages and the Union does not aggressively enforce the CBA without employee complaints. The district court concluded that IES's defamation claims—based on

Thomas' statements at Patrick Henry Middle School and Western Michigan University—and TLG's defamation claim—based on the Union's 2003 picketing—were preempted by federal labor law because the challenged statements were not made with actual malice. The district court found that IES was not entitled to restitution because it had not paid the June and July 2004 fringe benefits due to a mistake of fact or law.

II.

Following a bench trial, we review the district court's conclusions of law *de novo* and the district court's findings of fact for clear error. *Burzyncki v. Cohen*, 264 F.3d 611, 616 (6th Cir. 2001). Both legally and factually, there was sufficient, albeit limited, evidence that IES and TLG were alter egos, because their finances were significantly intermingled and they shared some employees, managers, and office space. "The alter ego doctrine . . . prevent[s] employers from evading obligations under the [National Labor Relations] Act merely by changing or altering their corporate form. The doctrine operates to bind an employer to a collective bargaining agreement if it is found to be an alter ego of a signatory employer." *Trs. of the Detroit Carpenters Fringe Benefit Funds v. Indus. Contracting, LLC*, 581 F.3d 313, 317-18 (6th Cir. 2009) (second insertion in original) (internal quotation marks omitted) (citation omitted). Alter ego liability attaches when "two enterprises have substantially identical management, business, purpose, operation, equipment, customers, supervision, and ownership. *Id.* at 318 (internal quotation marks omitted) (citation omitted). Alter ego liability may apply to a new, non-union entity that is

"merely a disguised continuance of the old [union] employer," or to a "double breasted operation" consisting of "two or more coexisting employers performing the same work [that] are in fact one business, separated only in form." *Id.* (internal quotation marks omitted).

First, the district court did not apply an incorrect legal standard for alter ego liability by balancing the relevant factors rather than determining substantial identity separately for each factor. "[T]he alter ego analysis should be flexible" and requires "a weighing of all the relevant factors," *NLRB v. Allcoast Transfer*, 780 F.2d 576, 581 (6th Cir. 1986), so that "no individual factor is outcome determinative," *Detroit Carpenters*, 581 F.3d at 318. Recent alter ego decisions of this and other circuits have applied a similar balancing test. *E.g.*, *id.* at 319; *Wilson v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 83 F.3d 747, 758 (6th Cir. 1996); *Trafford Distrib. Ctr. v. NLRB*, 478 F.3d 172, 179-81 (3d Cir. 2007). Therefore the district court applied the correct legal standard.

Second, the factual aspect of the district court's determination was not clearly erroneous. There was sufficient evidence for the district court to find that IES and TLG were substantially identical. The district court found that the IES and TLG's operations weighed heavily in favor of imposing alter ego liability because the companies' funds were pervasively intermingled due to numerous undocumented intercompany transfers and other payments. This finding is supported by testimony that TLG wrote IES checks for over $400,000 without a documented purpose, TLG paid IES rent and a management fee for

unspecified services, and the repeated monetary transfers between IES and TLG may indicate loan or subcontracting payments. The district court found that the firms' management, ownership, and business purpose weighed slightly in favor of imposing alter ego liability because the firms' management and ownership had some overlap, and the firms' business purposes were separate but not mutually exclusive. This finding is supported by Mr. and Mrs. Llamas' testimony. Both testified that IES and TLG shared projects, employees, and an office building, and that both Mr. and Mrs. Llamas had authority over the finances of both entities. Mr. and Mrs. Llamas each appeared on the payroll of the other's firm until 2003. Mrs. Llamas testified that, until 2004, TLG's work included painting. Therefore, while we might have reached a different conclusion if weighing the evidence independently, the district court did not clearly err when it found that, on balance, IES and TLG were substantially identical for alter ego purposes.

The NLRB settlement between IES, TLG, and the Union does not bar the Fund's alter ego claims because those parties did not agree that IES and TLG were not alter egos or that IES and TLG did not owe additional fringe benefits. Moreover, because the Fund owes its beneficiaries an independent obligation to enforce contribution requirements, the Union probably could not foreclose the Fund's ability to file suit. *See Food Employers Council, Inc.*, 293 NLRB 333, 334 n.2 (1989). Therefore, we uphold the district court's determination that IES and TLG were alter egos.

III.

The district court also had sufficient evidence to conclude that the Union did not violate 42 U.S.C. § 1981 when it ordered comprehensive audits of IES but not non-Hispanic Union contractors with closely related non-Union companies. The district court found that the Union would have ordered audits of IES regardless of IES's Hispanic ownership because IES employees had complained about IES's failure to pay fringe benefits and that the Union did not order comprehensive audits of other entities allegedly engaged in double breasting because it received no employee complaints about these entities. These findings are not clearly erroneous because they are supported by the testimony of Union officials and the other Union contractors.

IV.

IES's defamation claims fail because Thomas did not make the challenged statements—that IES was delinquent in paying fringe benefits—with actual malice.

> When a defamation action is based on an utterance that is related to a labor-management dispute and is made in the context of that dispute . . . federal law supplants state law with respect to the degree of fault that a plaintiff must establish. *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 64-65 (1966). Under *Linn*, a plaintiff must prove, in addition to the elements set out by state law, that the defendant published the statement in question with 'actual malice' as that term is defined in

New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964), and its progeny.

Holbrook v. Harman Auto., Inc., 58 F.3d 222, 225 (6th Cir. 1995). Under *Sullivan*, making a statement with actual malice means "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 280.

The record supports the district court's finding that Thomas did not make either statement with knowledge of or reckless disregard for its falsehood. Thomas testified that he believed IES would renew its Union contract after further negotiation. This belief was reasonable because other Union contractors who initially noticed an intent to withdraw from Union contracts had renewed those contracts after negotiation and because Mr. Llamas had indicated that IES would remain a Union contractor by placing a Union steward on a new project and agreeing to pay fringe benefits based on that project after the general contractor paid IES. Therefore, the IES's defamation claims fail.[2]

TLG's defamation claim also fails because the challenged statement—that TLG pays unfair wages—was not made with actual malice. The record supports the district court's finding that the Union had a reasonable belief that TLG's wages were lower than the Union rates because, when the statement was made, TLG still did painting work that otherwise

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[2] The district court also concluded that § 301 of the LMRA preempted IES's defamation claims. Because these claims fail under *Linn*, we do not consider § 301 preemption.

would have been done by IES, and as the district court noted, there was no reason for TLG to do painting work unless it was paying lower wages than IES.

V.

IES is not entitled to restitution for its post-CBA-termination June and July 2004 fringe benefit payments because IES did not make those payments by mistake of fact or law. Section 403(c) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, provides that "the assets of a plan shall never inure to the benefit of any employer" and permits refunds of excess contributions only when made "by a mistake of fact or law." 29 U.S.C. § 1103(c)(2)(a)(ii). This court has recognized a federal common law restitution claim for recovery of excess contributions, *Whitworth Bros. Storage Co. v. Cent. States Se. & Sw. Areas Pension Fund*, 794 F.2d 221, 236 (6th Cir. 1986), but has held that ERISA "places the determination as to whether a mistaken contribution was made in the hands of the benefit plan administrator" and the administrator's decision "is conclusive unless arbitrary or capricious, not supported by substantial evidence, or erroneous on a question of law," *Teamster's Local 348 Health & Welfare Fund v. Kohn Beverage Co.*, 749 F.2d 315, 321 (6th Cir. 1984).

The common law right recognized in *Whitworth* is limited by the ERISA provisions permitting refunds of excess contributions only when there is a mistake of fact or law. In *Whitworth* itself we noted that "Whitworth's claim is . . . expressly limited by the terms of ERISA set out in section 403(c)(2)(A)." 794 F.2d at 236 n.24. The Ninth Circuit has read our law

as so limited: "There is nothing in [*Whitworth* and similar] opinions to indicate that such a cause of action has substantive elements distinct from a section 403(c)(2)(A)(ii) [claim]." *British Motor Car Distribs., Ltd. v. S.F. Auto. Indus. Welfare Fund*, 882 F.2d 371, 377 (9th Cir. 1989). In our later opinion in *Whitworth II* we stated that "a pension fund's refusal to refund contributions paid *by mistake* is arbitrary unless retention of the money is necessary to the financial soundness of the plan or justified by some other compelling reason." 982 F.2d 1006, 1017 (6th Cir. 1993) (emphasis added); *see also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (ruling on another ERISA provision and stating that courts have been "especially reluctant to tamper with [the] enforcement scheme embodied in the statute by extending remedies not specifically authorized by its text.") (internal quotation marks omitted) (insertion in original); *Chao v. Malkani*, 452 F.3d 290, 297 (4th Cir. 2006) (applying *Knudson*'s textually restrictive reasoning to a federal common law restitution claim). Therefore, IES cannot recover the June and July 2004 fringe benefit contributions unless these payments were made by mistake of fact or law.

As the district court found, IES did not make these payments by mistake of fact or law. Instead, Mr. Llamas's testimony indicates that he felt that allowing his workers to return to work was more important than contesting his requirement to pay the funds. Therefore, IES is not entitled to restitution because Mr. Llamas did not make these payments by a mistake of fact or law. We need not rely on the district court's alternative holding that IES is precluded from restitution because it did not first make a formal request for a refund before filing a restitution claim.

VI.

For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No: 05-70110

[Filed June 25, 2008]

TRUSTEES OF THE PAINTERS UNION DEPOSIT FUND, a voluntary unincorporated trust,

Plaintiff,

vs.

INTERIOR/EXTERIOR SPECIALIST, CO., Michigan corporation, THE LLAMAS GROUP, CORP., a Michigan corporation, and RITO JULIAN LLAMAS, individually, jointly and severally,

Defendants.

AND

INTERIOR/EXTERIOR SPECIALIST, CO., a Michigan corporation, THE LLAMAS GROUP, CORP., a Michigan corporation, and RITO JULIAN LLAMAS, individually, jointly and severally,

Counter-Claimants and Third-Party Plaintiffs,	)
vs.	)
TRUSTEES OF THE PAINTERS UNION DEPOSIT FUND, a voluntary unincorporated trust,	)
Counter-Defendant,	)
AND	)
PAINTERS DISTRICT COUNCIL NO. 22 OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES (AFL-CIO)	)
Third-Party Defendant.	)

Honorable Victoria A. Roberts

ORDER DENYING DEFENDANTS'/COUNTER-CLAIMANT'S/THIRD-PARTY PLAINTIFFS' MOTION TO RECONSIDER FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the Court is Defendants'/Counter-Claimant's/Third-Party Plaintiffs' Motion to Reconsider Findings of Fact and Conclusions of Law.

Eastern District of Michigan Local Rule 7.1(g)(3) provides for reconsideration if the movant demonstrates a palpable defect by which the court and the parties have been misled, and further demonstrates that correcting the defect will result in

a different disposition of the case. "A 'palpable defect' is a defect which is obvious, clear, unmistakable, manifest, or plain." *Fleck v. Titan Tire Corp.*, 177 F. Supp. 2d 605, 624 (E.D. Mich. 2001). "[T]he court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication." L.R. 7.1(g)(3).

Defendants failed to make the required showing for reconsideration. Therefore, Defendants' motion is **DENIED**.

IT IS ORDERED.

s/Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: June 25, 2008

The undersigned certifies that a copy of this document was served on the attorneys of record by electronic means or U.S. Mail on June 25, 2008.

s/Linda Vertriest
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No: 05-70110
Honorable Victoria A. Roberts

[Filed March 18, 2008]

TRUSTEES OF THE PAINTERS UNION DEPOSIT FUND, a voluntary unincorporated trust,

Plaintiff,

vs.

INTERIOR/EXTERIOR SPECIALIST, CO., Michigan corporation, THE LLAMAS GROUP, CORP., a Michigan corporation, and RITO JULIAN LLAMAS, individually, jointly and severally,

Defendants.

AND

INTERIOR/EXTERIOR SPECIALIST, CO., a Michigan corporation, THE LLAMAS GROUP, CORP., a Michigan corporation, and RITO JULIAN LLAMAS, individually, jointly

and severally,

Counter-Claimants and
Third-Party Plaintiffs,

vs.

TRUSTEES OF THE PAINTERS UNION DEPOSIT FUND, a voluntary unincorporated trust,

Counter-Defendant,

AND

PAINTERS DISTRICT COUNCIL NO. 22 OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES (AFL-CIO)

Third-Party Defendant.

JUDGMENT

Consistent with the Court's Finding of Facts and Conclusion of Law filed on March 18, 2008;

IT IS ORDERED that Judgment is entered in favor of Plaintiff.

IT IS FURTHER ORDERED that on the counterclaim, Judgment is entered in favor of Counter-Defendant and Third-Party Defendant.

Dated at Detroit, Michigan on March 18, 2008.

David J. Weaver
Clerk of the Court

Approved: BY: /s/ Linda Vertriest

/s/ Victoria A. Roberts
Victoria A. Roberts
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No: 05-70110
Honorable Victoria A. Roberts

[Filed March 18, 2008]

TRUSTEES OF THE PAINTERS UNION DEPOSIT FUND, a voluntary unincorporated trust,

Plaintiff,

vs.

INTERIOR/EXTERIOR SPECIALIST, CO., Michigan corporation, THE LLAMAS GROUP, CORP., a Michigan corporation, and RITO JULIAN LLAMAS, individually, jointly and severally,

Defendants.

AND

INTERIOR/EXTERIOR SPECIALIST, CO., a Michigan corporation, THE LLAMAS GROUP, CORP., a Michigan corporation, and RITO JULIAN LLAMAS, individually, jointly

and severally,	)
	)
Counter-Claimants and Third-Party Plaintiffs,	)
	)
vs.	)
	)
TRUSTEES OF THE PAINTERS UNION DEPOSIT FUND, a voluntary unincorporated trust,	)
	)
Counter-Defendant,	)
	)
AND	)
	)
PAINTERS DISTRICT COUNCIL NO. 22 OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES (AFL-CIO)	)
	)
Third-Party Defendant.	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

This matter came before the Court for a non-jury trial. The parties submitted the following as their "Concise Joint Statement of the Case" in their Joint Final Pre-Trial Order:

> Plaintiff Fund seeks from all three defendants fringe benefits and liquidated damages due in accordance with a collective bargaining agreement ("CBA"), a personal guaranty, and

> alter ego liability. Defendant IES seeks from Plaintiff a return of the $56,356.27 of fringe benefit payment made after May 31, 2004. The [D]efendants also seek damages from Third-Party Defendant Painters District Council No. 22 (the "Union") for defamation and discrimination.

The Trustees of the Painters Union Deposit Fund ("Trustees") bring their claim for unpaid fringe benefits under the Labor Management Relations Act of 1947, 29 U.S.C. § 141, *et seq.*, ("LMRA"), and the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1132, 1145 ("ERISA"). Defendants are Interior/Exterior Specialist, Co. ("IES"), The Llamas Group, Corp. ("TLG"), and Rito Julian Llamas ("Mr. Llamas"). Defendants IES and TLG assert crossclaims against Painter District Council No. 22 of the International Brotherhood of Painters and Allied Trades (AFL-CIO) ("the Union") for discrimination pursuant to 42 U.S.C. § 1981 and for defamation under the laws of Michigan. IES' counterclaim for breach of contract is pursuant to federal common law. The Court has jurisdiction over the federal claims under 28 U.S.C. § 1331, 29 U.S.C. § 185(a), 29 U.S.C. § 1132(a)(3). The Court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367. However, the findings and conclusions of law are that federal law preempts the state claims. *See infra* ¶¶ 233-255.

A bench trial was conducted on December 10th, 11th, and 12th, 2007.

II. FINDINGS OF FACT

A. Alter Ego

1. Ownership and Management

1. IES was incorporated on July 31, 1997 by Mr. Llamas, and he is its registered agent.

2. Mr. Llamas is the sole shareholder, officer (President), and director of IES, and runs its day-to-day operations.

3. Nonetheless, Mrs. Llamas signed the State of Michigan IES tax filing for 2003 as President of IES.

4. The CBA, signed October 5, 1998 by Mr. Llamas, lists Mrs. Llamas as Vice-President of IES.

5. TLG was incorporated on March 30, 1999 by Mrs. Llamas.

6. Mrs. Llamas is the sole shareholder, officer, and director of TLG.

2. Business Purpose

7. IES performs industrial and selective demolition work, but largely focuses on painting.

8. IES was a union contractor pursuant to a CBA with the union until May 31, 2004.

9. TLG is a non-union general contracting firm whose work includes design/build, concrete work, and masonry work. Prior to a May 21, 2004 settlement agreement with the Union and IES, TLG also did some painting work.

10. TLG focuses on private sector jobs; IES focuses on public sector jobs.

3. Equipment

11. IES and TLG have separate field equipment.

12. IES and TLG do not rent or lease equipment from each other.

13. IES and TLG do not share office equipment such as: copiers, computers, and telephones.

14. IES and TLG have separate automobiles.

15. IES and TLG have separate cell phone accounts.

16. IES and TLG each pay for their own office supplies and computers.

17. IES and TLG have separate storage facilities for equipment and materials.

4. Operations

18. Mr. and Mrs. Llamas jointly own the Allen Road Building. TLG has always operated from this building. IES operated out of a building in Lincoln Park until late 2000 or 2001, and then

moved to the Allen Road Building, where TLG and IES lease space.

19. TLG often pays IES a largely arbitrary building management fee. The management fee purportedly covers the rent, utilities, snow removal, lawn care, upkeep on the building, repairs and upgrades. However, the companies do not keep accurate records of the amount of the management fee or of the services on which the management fees are based.

20. TLG and IES have separate bank accounts, lines of credit, vendor credit accounts, credit cards, federal employer identification numbers, corporate records, phone numbers, internet domains, tax accounts for the State of Michigan, tax accounts for the City of Detroit, unemployment accounts, worker's compensation insurance, and office personnel.

21. There were three signatories to the IES checking account: Mr. Llamas, the IES office manager, and Mrs. Llamas.

22. From September 2001 to April 2005, IES wrote at least 10,000 checks.

23. From September 2001 to April 2005, TLG wrote at least 15,000 checks.

24. There were two signatories on the TLG checking account: Mr. and Mrs. Llamas.

25. Mr. Llamas signed four TLG checks totaling $3,478, one of which was payable to him in the amount of $1,700.

26. Mr. Llamas testified that twelve TLG checks were paid to IES totaling $423,787.47. He offered no opinion about two of these checks totaling $37,500. He testified that some were likely for a job, a loan, or an account payable. However, he was not sure what the purpose was for six of the checks with a total value of $232,817.78.

27. Mr. Llamas was not sure of the purpose of five IES checks payable to Mrs. Llamas, totaling $7,182.20.

28. Mr. Llamas was not sure of the purpose of six IES checks signed by Mrs. Llamas totaling $28,071.92.

29. Mr. Llamas was not sure of the purpose of a $21,000 bank charge of IES to TLG, nor of a $20,000 account charge written to TLG but then scratched out and charged to IES.

30. Prior to the incorporation of TLG, Mrs. Llamas did data entry for IES and worked on its books and records. After TLG was formed, Mrs. Llamas continued to help with the checkbook for IES.

31. Shaneez Gill did temporary work for IES, and was hired at times as a temporary worker for TLG. However, she did not work for both during the exact same time period.

32. Different people usually answer the phone for TLG and IES. Staff from either office can see the phone ringing for the other company. On occasion, if nobody is available to answer the phone from one company, staff from the other company will pick up the line.

33. In the last five years, IES has had 250 to 300 employees.

34. Painting employees freely floated between TLG and IES depending on which company had work to do.

35. Mr. Ruehle found that many of the TLG painters who performed work in 2001 and 2002 were also employed by IES. Several of these employees appeared on the payrolls of IES and TLG in the same month, and more than fifty percent of the IES employees also worked for TLG.

36. The employment-shifting patterns Mr. Ruehle noticed for the TLG and IES painters continued in 2003 and 2004 but were not as stark as they were for 2001 and 2002.

37. Prior to May 31, 2004, fourteen painters performed work for both IES and TLG.

38. After the settlement agreement TLG painters either went to IES to work or, if they didn't want to become part of the union, they were laid off.

39. TLG and IES had different geographical territories with respect to their operations. TLG's geographical area was generally limited to the tri-county area of Wayne Oakland and Macomb, while IES worked from Toledo to Marquette.

40. The IRS audited TLG several months after the Trustees' expert, Robert Scheuer, was deposed. The IRS concluded that there was nothing wrong with TLG's tax returns from 2003 and 2004. Although the audit also involved examination of some of the transactions between TLG and IES, it was not a comprehensive audit of IES.

41. Mrs. Llamas received substantial pay from IES during 2001 and 2002.

42. Mr. Llamas received substantial pay from TLG during 2001.

43. Substantial transfers of money between IES and TLG are noted in the check registers simply as "accounts payable/trade."

44. The IES 2002 federal tax return, IES general ledger, and TLG general ledger indicate that IES received a management fee of $106,254 for the fiscal year ending in 6/30/03. However, no evidence was presented to substantiate the amount of the fee, or why it was paid.

45. The parties stipulated that the TLG general ledger for the same fiscal period ending June 30, 2003 shows equipment rental of $71,200 on

June 30, 2003. It contains a specific category, denoted "6290 rent," for rental of IES equipment. However, no evidence was presented to substantiate the amount of the $71,200 rental fee, or why it was paid.

46. Mr. Llamas did not know why in some years IES received substantial rental income and management fees from TLG, and in other years IES received little or no rental income or management fees from TLG.

47. The tax returns demonstrated that in years where TLG was more profitable than IES, large amounts of income were shifted by and between TLG and IES, without supporting agreements or documents, in a manner that resulted in a reduction of TLG's income taxes.

48. Because IES for the year ending June 30, 2003 had negative taxable income in excess of the equipment rental and management fees it received from TLG, its income taxes were not increased. The parties stipulated at the trial that in tax year 2003, which ended June 30, 2003, TLG had taxable income of $154,166.

49. The parties stipulated at the trial that in tax year 2003, IES had taxable income of $441,447.

50. For the fiscal year ending in 2004, the general ledgers show $172,000 in management and rental fees paid to IES from TLG, which was 39% of IES' income for that tax year.

51. Mr. Llamas testified he was not familiar with the accounting of IES, and that he merely provided information to his accounting firm that prepared IES' tax returns. He had no knowledge of any IES documents that were given to its accountant besides the general ledger.

52. The parties stipulated at trial that there were no written agreements evidencing loans between IES and TLG or any subcontracting arrangements between IES and TLG.

53. Whenever money was needed by one company the other company would loan it. Accountants later dealt with the necessary accounting records.

54. Mrs. Llamas admitted that no writings exist which evidence any agreement between IES and TLG on anything.

55. Mrs. Llamas testified that she isn't sure how the attorneys or accountants allocate the rent for the premises, that the accountants write the rent checks, and that she is not sure who the rent checks are written to.

56. Mr. Llamas sometimes helps the TLG staff if somebody is loading a spray machine or if TLG deliveries arrive.

57. IES and TLG have had and continue to have the same accounting firm.

58. Their previous accountant made all decisions concerning management fees, equipment rental,

and other fees charged between the two companies.

59. Before she switched accounting firms, Mrs. Llamas did not review the tax returns before signing them or know what the fees connected to IES related to. Similarly, Mrs. Llamas does not know why there is so much debiting and crediting between IES and TLG reflected in the tax returns.

60. Robert Scheuer ("Scheuer") analyzed journal entries related to transfers of money between IES and TLG which were designated as inter-company transfers. Scheuer opined that, if IES and TLG were truly separate and independent companies, it would be inappropriate to designate these as inter-company transfers.

61. Scheuer also identified inter-company transfers that were not equal between IES and TLG. He determined that only one out of the three years he looked at were the inter-company transfers on both sets of books equal.

62. Scheuer identified several entries where accounts receivable on one set of books should have been listed as a corresponding entry on the other set of books, but wasn't.

63. Scheuer observed extensive billing of items between IES and TLG that affected the income and cost of goods sold by the two companies.

64. Scheuer testified that the numerous inter-company transactions reflected on the books can

have an effect on who is reflected as making money on each company's tax return, and had the effect of increasing or reducing the net income of each company.

65. Scheuer found it significant that, although Mrs. Llamas has testified that there were numerous loans between the companies, the tax returns identified very few loans, and there was no indication that loan interest was charged on any transactions, even though the IRS states that interest should be charged on intercompany loans between parties.

66. Scheuer testified that he saw no information that was given to IES and TLG's accountants that would have enabled them to make the entries made.

67. In comparing the tax returns to their general ledgers, Scheuer identified a couple of years where the entries in the general ledgers did not match with the entries on the tax returns when they should have.

68. In Scheuer's opinion, IES and TLG are financially and substantially intertwined, to such an extent that it is extremely difficult to consider IES as financially separate from TLG. Scheuer stated that when such large amounts of money move between companies, and the principals neither know nor care what the transfers are for and the principals are both getting money from the two companies, more likely than not the principals do not care

whether one company or the other company gets the money.

5. Supervision

69. The IES field supervisors are different than the TLG field supervisors.

70. Tony Mezzotta was a full-time IES employee who started in 1999, worked his way up to General Manager of IES, and continued in the position through at least August of 2005. Sometime thereafter, he stopped working for IES and became a supervisor for TLG.

71. On a few occasions, Mr. Llamas helped TLG supervise its jobs without direct compensation as a favor to Mrs Llamas.

6. Customers

72. IES functions as a subcontractor, so its customers are normally general contractors, such as TLG. IES' customers are often TLG's competitors.

73. TLG would generally take in revenue and pay IES for the work that TLG subcontracted to IES.

74. The parties stipulated at trial that the following were customers of IES from 2002 through 2004, and received payment in the following amounts, as indicated in the general ledger:

#	Project/Job	Year	Amount
1	Waterstone	2002	over $167,000
2	Waterstone	2003	over $64,000
3	Tecumesh	2003	$30,000
4	John Glenn	2002	over $100,000
5	John Glenn	2003	over $45,000
6	Andrews (residence)	2003	over $40,000
7	Lawrence Tech	2003	over $245,000
8	Allen Park/Way	2002	$9,600
9	Town Village Sterling	2002	over $80,000
10	Town Village Sterling	2003	over $12,000
11	Genoa	2002	over $45,000
12	Dexter	2002	over $200,000
13	Frank Murphy/Way	2003	over $204,000
14	Groves	2002	over $60,000
15	KMS	2002	over $60,000
16	L'anse Creuse	2004	$5,000
17	Niles Center	2003	over $8,000
18	PC/720	2003	over $470,000
19	Rochester High	2002	over $600,000

20	Rochester Paint	2002	over $109,000
21	Rochester Paint	2003	over $185,000
22	Roosevelt High	2004	$12,500
23	Saline High	2004	over $484,000
24	South Lyon	2002	over $335,000
25	U of M West Hall	2003	over $77,000

75. The parties stipulated at trial that TLG's general ledgers reflect that TLG billed for work for the following projects, during the following years in the following amounts:

#	Project/Job	Year	Amount
1	Waterstone	2002	over $160,000
2	Waterstone	2003	over $43,000
3	Tecumseh	2002	over $150,000
4	Allen Park Wyandotte	2003	over $4,000
5	Town Village Sterling	2002	over $300,000
6	Town Village Sterling	2003	over $30,000
7	Genoa	2002	over $16,500
8	Andrews	2003	over $6,600
9	Dexter	2002	$10,000

10	Frank Murphy/Way	2004	$25,000
11	Groves	2002	$10,000
12	John Glenn	2003	$10,000
13	KMS	2003	$20,000
14	L'anse Creuuse	2004	over $57,000
15	Lawrence Tech	2003	over $80,000
16	Niles Center	2003	over $8,700
17	PC/720	2003	$28,000
18	Rochester High	2002	$21,000
19	Rochester Paint	2002	$21,000
20	Rochester Paint	2003	$20,000
21	Roosevelt High	2004	over $60,000
22	Saline High	2004	over $25,000
23	South Lyon	2002	$25,000
24	U. of M. West Hall	2002	over $5,800

76. The following represent cases where TLG subcontracted painting work to IES: Waterstone, Tecumseh, Genoa, L'anse Creuse, Niles Center, and Roosevelt High projects. However, IES and TLG do not assert subcontracting from TLG to IES for, at least, the John Glenn, Lawrence Tech, Town Village Sterling, Dexter, Frank/Murphy Way, Groves, KMS, PC/720, Rochester High, Rochester Paint, Saline High, South Lyon, and University of

Michigan West Wall projects, which IES and TLG worked on in the same or subsequent years.

7. Intent to Evade

77. The IES general ledger for the fiscal year ending in 2003 shows five bills from TLG for subcontracting: $5,000, $26,500, $4,000, $5,000, and $16,500.

78. A member of the Union, Steven Chaney, complained to the Union in or around 2003 that he was painting for both TLG and IES and that he was not receiving the benefits of the Union contract when working for TLG. Chaney provided the Union with pay stubs which indicated that he worked for both companies.

79. On or about July 18, 2003, Steven Chaney filed an unfair labor practice charge with the National Labor Relations Board against IES and TLG alleging alter ego liability.

B. Defamation

1. Patrick Henry School

80. As of September 2004, IES had not made June or July fringe benefit contributions to the Union trust fund.

81. George Lancaster, an IES employee, testified that in September or early October of 2004 he called the Union and spoke to Tommy Thomas ("Thomas"), the Union's Business Represen-

tative for his jurisdiction, and told him his fringe benefits had not been paid on the job. He had received a letter stating that his insurance would be cancelled because the contractor had made benefit contributions.

82. Thomas went to the job site and advised the superintendent that IES was delinquent in its fringe benefit contributions. He said the Union would have to put a lien on the job, review payroll records, or remove Union workers from the site, unless IES brought its benefit obligations up-to-date.

83. The Union represented to non-parties that IES was a union contractor.

84. Later that day, Mr. Llamas provided Thomas with a check for the past due fringe benefit payments by IES.

85. The Union had a good faith belief prior to early December 2004 that IES would again renew its status as a Union contractor and, therefore, had an obligation to make fringe benefit contributions despite IES' March 23, 2004 termination letter.

86. When questioned by Robert Kennedy ("Kennedy"), the Business Manager, Secretary and Treasurer of the Union about problems paying fringe benefits, Mr. Llamas had previously responded that the omission was because of cash flow problems. He gave the same response when he communicated with

Kennedy about the Patrick Henry School project.

2. Wayne State University

87. Thomas testified that in 2003, when he was at Wayne State picketing a job at a parking structure performed by a nonunion company unrelated to this case, he spoke with Robert Moore, who was supervising a painting job at Wayne State performed at an adjacent location. Thomas was not familiar with TLG then.

88. Moore, a TLG job foreman, told Thomas that IES was supposed to do the work on the job.

89. Thomas spoke with Kennedy, who confirmed that IES was supposed to perform the work on the job. Kennedy suggested to Thomas that he check on the job.

90. The next day, Thomas again went to the job site and was told by some of the painters on the job that they were employees of TLG. Thomas understood TLG to be a nonunion contractor. He also asked workers to produce their union cards; they were unable to do so.

91. Based on his understanding that the job was improperly performed by nonunion workers, Thomas put a picket line up on the job. Thomas testified that the picket line said that TLG was not a signatory with the Union. However, the Court found the testimony of Mrs. Llamas more credible than that of Thomas, and finds that the Union's picketers held signs on the Wayne State

University project that stated, "Llamas Group pays unfair wages."

92. At trial, Thomas admitted that he had no way of knowing whether TLG was paying the prevailing wage or not.

3. Western Michigan University

93. The IES Western Michigan University job occurred in early December 2004, but before Mr. Llamas had definitively advised Kennedy that IES no longer intended to be a Union contractor.

94. Thomas received a call from an employee working for IES on this job, Gustavo Torres, who complained that fringe benefits were not being paid.

95. After Thomas arrived at the site, he spoke with two job superintendents, who were employees of Granger Construction. Thomas advised them that IES was not paying fringe benefits to its employees working on the job. Thomas asked if they could provide some help with the situation, such as getting joint checks issued so that they could not be cashed without the Union's fund's signature.

96. After speaking to Thomas on the phone and telling his workers to leave the job, Mr. Llamas went to the Union headquarters with two of his employees, and declared that he was no longer going to be a party to the CBA.

C. Racial Discrimination

1. The Union

97. Mr. Llamas is Hispanic and his company is Hispanic owned and controlled.

98. No evidence was presented regarding the precise number or percentage of Hispanic employees of IES or TLG.

99. While he was a journeyman painter and before he started IES, Mr. Llamas complained to Mr. Kennedy, the Union's business agent, about selective enforcement and non-enforcement of the CBA. He complained about improper subcontracting by Madias Brothers Painting Company, Duross Painting Company, and E&L Commercial Interiors when he worked with them.

100. At least twice while a journeyman painter, Mr. Llamas presented proof to Mr. Kennedy that his pay stubs from Madias and E&L did not match the benefits they paid him.

101. The only remedy Kennedy offered was that Llamas talk to his employers.

102. While Kennedy told the accused companies of Llamas' complaints, he took no action to address Mr. Llamas' grievances.

103. Mr. Llamas stopped making the complaints because his hours as a painter were cut or

reduced: Madias stopped using Mr. Llamas as a journeyman painter and E&L cut his hours.

104. Journeymen were then making between $40,000 and $50,000 per year, but Mr. Llamas's pay dropped to $17,000.

105. Mr. Llamas started IES because of these pay cuts.

106. The Union Apprenticeship Program ("UAP"), a training program for people who wanted to become union painters, did not take Spanish-speaking individuals because it did not have a Spanish-speaking instructor. Rather than hire one, the Union exempted anyone who did not understand English from participation in the UAP.

107. Mr. Llamas trained Hispanic workers who could not understand English, even though the Union deducted money from their checks to pay for the UAP.

108. Mr. Llamas repeatedly complained about this apprenticeship policy.

109. The Union developed Spanish language "informational" materials. One purpose of the informational materials is to inform non-union members of the difference between non-union and union pay rates. The Union had not developed "informational" materials in other non-English languages.

110. After Mr. Llamas signed the CBA on October 5, 1998 on behalf of IES, he again alleged that Union companies violated the CBA.

111. In a letter dated June 11, 2002, Mr. Llamas alleged selective enforcement and non-enforcement of the CBA. Although the letter did not state the names of specific companies, Kennedy knew whom Mr. Llamas referenced in his letter. Mr. Llamas did not receive a response.

112. On or about August 21, 2003, the Union, based on Steven Chaney's July 18, 2003 NLRB complaint (*see* ¶¶ 81-82) and its own review, concluded that IES and TLG improperly operated double-breasted companies. It filed its own NLRB charge against IES and TLG, alleging alter ego liability.

113. On April 2, 2004, Mr. Llamas sent Thomas a grievance letter complaining about union contractors who cheat.

114. Kennedy received and denied the grievance letter on April 18, 2004. In his response, he indicated that he believed Llamas's grievance was retaliatory because the Union filed alter ego charges (at that point settled) with the NLRB. Kennedy stated he believed the allegations had no basis in fact because they were only a "general statement about the industry, not a particular employer."

115. This was the Union's only response and Kennedy did not investigate Mr. Llamas' complaints before responding.

116. Nevertheless, Kennedy believed there was a significant chance the allegations were true.

117. Mr. Llamas never alleged selective enforcement of the CBA based on racial discrimination.

118. Kennedy did not take action against the accused companies, in part, because the heads of these companies held union-related leadership positions.

119. Mr. Llamas told Thomas that he had evidence that almost every painting company was an alter ego or subcontracting to non-union workers.

120. Mr. Thomas did not investigate the companies that Mr. Llamas complained about, even though he told Mr. Llamas that he had.

121. Thomas made only a single phone call to one painter concerning Madias' companies, and held discussions with a few other Union business agents concerning what they knew about Madias.

122. Between the formation of IES on July 31, 1997 and May 31, 2004, the Union did not receive formal complaints or documentary evidence from any other Union member painters that other employers acted double-breasted or were in an alter ego relationship.

123. The CBA initially terminated May 31, 2003. The Union and IES agreed to a one year extension. After this date, the CBA was automatically renewed each year unless IES sent notice sixty days before the annual anniversary date of the extension.

124. IES terminated participation in the CBA in accordance with the CBA in its March 23, 2004 letter, before the April 1, 2004 due date.

125. Mr. Kennedy admitted at trial that the Union's answer to IES and TLG's interrogatory was incorrect because it erroneously claimed that IES did not properly withdraw from the Union because it did not get the consent of the Painters District Council No. 22 and the Michigan Alliance of Union Painting Contractors ("MAUPC").

126. However, a withdrawing contractor need not notify the MAUPC or the Union before it withdraws.

127. No adverse action had been taken against other Union contractors who withdrew from the CBA.

128. Mr. Kennedy is the highest official in the Union.

129. The NLRB charges recently filed by Roberto Gonzalez, after consultation with Kennedy, were filed by the Union in order to harass IES.

130. Multiple reasons motivated Kennedy's adverse actions (i.e., strong resistance to the termination of the contract, statements to

customers which disparaged IES, interference at IES work sites, the comprehensive audit on IES and TLG, and approval of recent NLRB charges against IES by Roberto Gonzales). These reasons included: (1) retaliation against IES for attempting to leave the union; (2) strengthening the Union by making an example of IES; and (3) animus towards Hispanics and/or the perceived propensity of Hispanics to be more difficult to organize as Union members.

131. The Trustees of the Fund can only have a vote to conduct a comprehensive audit if the Union requests it.

132. Kennedy testified that in order to request a comprehensive audit, a complaint has to be lodged by an employee. He denied knowing who requested that the comprehensive audit include TLG. Kennedy stated he had to have documentation evidencing violation of the CBA, such as check stubs, from a member or employer, in order to request a comprehensive audit.

133. The complaints by George Lancaster, Daniel Chaney and Mark Chaney upon which Mr. Kennedy based his request for the comprehensive audit, did not reference TLG.

134. Because there was no complaint relating to TLG during the post-settlement period, it may not have been proper to audit TLG. Nonetheless, TLG acquiesced to the audit and worked through the calculations of the potential amount of alter ego liability with the Fund.

2. Madias Brothers

135. Marcos Madias ("Mr. Madias") is partial owner of Madias Brothers Painting Company ("MBPC"), a signatory to the CBA.

136. Madias Brothers performs paint contracting services.

137. Mr. Madias is Greek.

138. MBPC and Madias Brothers Inc. ("MBI") (a non-union signatory) are one company.

139. MBPC is a wholly owned subsidiary of MBI.

140. MBPC and MBI have the same officers, directors, ownership, telephone number, and offices located at 12850 Evergreen Road, Detroit, Michigan. There is only one checkbook for MBPC and MBI.

141. Mr. Madias also operates First Evergreen Inc. ("FEI") and Grove Recycling Services, Inc. ("GRSI") out of the same offices using the same phone number as MBPC and MBI.

142. MBPC, MBI, and FEI use the same checking account.

143. The Union, through the Funds, annually audits Madias Brothers Painting Company at the Evergreen Road offices in the same manner it annually audits IES.

144. The Fund has not done a comprehensive audit of Marcos Madias or any of his companies since 1979.

145. The books and records of MBPC indicate payments to FEI for a $213,402.50 subcontract, a $409,294.80 subcontract, and various other subcontracts.

146. The Union or Fund never reviewed the records of Grove Recycling.

147. MBPC, MBI, FEI, and GRSI engaged in inter-company transactions among the corporate entities through loans and related party disbursements.

148. Marcos Madias, President of the MAUPC, has been a Trustee of the Funds since 2005. He was elected to this position through an election by the MAUPC.

149. One purpose of the MAUPC is to negotiate group contracts with the Union.

150. One reason the Madias companies were never subjected to a full audit is because Mr. Madias is a Trustee of the Fund and President of MAUPC.

151. FEI stopped being a signatory to the CBA when its contract expired by simply not signing another CBA.

152. FEI is currently not a signatory to the CBA with the Union, but it has a union contract with Teamsters Local 299.

153. FEI now provides custodial services for Madias companies.

154. Once FEI stopped being a signatory to the CBA, the Union never claimed it continued to be a signatory.

155. GRSI engaged in rubbish removal and disposal. It has an agreement with Teamsters Local 299.

156. MBI provides administrative services to FEI and MVPC, and has provided such services to GRSI as well. These services are related to health and welfare benefits, vehicle expenses, and purchases by MBI that were supplied to its subsidiaries.

157. MBPC violated the CBA by subcontracting work to non-union companies.

158. IES did not present any evidence showing that the Union should have become aware of the violations of the CBA through the normal annual audit process.

3. Duross Painting

159. Duross Painting Company ("DPC") has been a signatory to the CBA since 1974.

160. Duross Painting Company ("DPC"), Duross Maintenance Company ("DMC"), and R. Duross

Financial Corporation ("DFC") have common ownership. Robert Singer ("Singer") owns 70% each of DPC, DFC, and DMC. Michelle Simon ("Simon") owns 30% in each of these companies.

161. Singer has been the Treasurer of the MAUPC since its inception approximately ten years ago.

162. DPC, DFC, and DMC have the same address: 27270 Gloede in Warren, Michigan.

163. DMC does various repairs, including painting and general maintenance work.

164. DFC is a company that Singer uses to do small repairs and maintenance work.

165. The Fund has not done a comprehensive audit of the Duross companies.

166. DPC, DMC, and DFC engaged in inter-company financial transactions. Specifically, DPC (the union company) subcontracts work to DMC (non-union company). DPC (union company) pays DFC (non-union company) via check for the work that DMC (non-union company) does.

167. DPC does not have written contracts for the work it subcontracts to DMC. There are no written agreements about any work among the three Duross companies.

168. Singer admitted there were occasions when his companies subcontracted work to non-union painters.

169. Both Simon and Singer are authorized to write checks for all three Duross companies.

170. The Union never asked the owners of the Duross companies for documents with respect to DFC or DMC.

171. No employees of Singer's companies ever filed a grievance or complaint with the Union claiming improper subcontracting to non-union workers.

172. The documentary evidence of Singer's subcontracting of work to non-union painters was produced pursuant to subpoenas served by IES and TLG in this case.

173. Singer admitted he "made every effort to conceal" evidence of improper subcontracting from the Union.

174. DPC violated the CBA by subcontracting work to non-union companies.

175. IES did not present any evidence that these records would indicate a violation of the CBA without the use of a comprehensive audit.

176. IES did not present any evidence showing that the Union should have become aware of the violations of the CBA through the normal annual audit process.

4. Abbey Painting/Lancaster Painting & Maintenance

177. George Lancaster ("Lancaster") set up a painting company called "Abby Painting" in his wife's name when Lancaster was a member of the Union.

178. He also approached the Union about setting up a union affiliated painting company called Lancaster Painting & Maintenance.

179. After Lancaster spoke with the Union about operating his own union affiliated painting business and realized he could not afford to do so, there is no evidence that Lancaster Painting & Maintenance or Abbey Painting performed painting work.

5. Forrest Painting

180. Mr. Nikitas Balatzis ("Balatzis") has owned non-union Forest Painting, Inc. ("FPI") since 1995. FPI first hired Hispanic workers in March or April 2005 four of six new employees.

181. In the ten years prior to hiring Hispanics, Balatzis had been approached about five times by the Union or a Union representative to sign a Union contract.

182. Kennedy planted a fully paid Hispanic Union employee, Roberto Gonzalez, with FPI. Mr. Kennedy never planted an employee in any of Mr. Madias or Mr. Duross' projects.

183. Mr. Kennedy's only union "plant," Roberto Gonzalez, is Hispanic.

184. Two months after hiring Hispanic workers, Balatzis received a call from Thomas who said that he had information that FPI was not paying some employees properly, and that a complaint may be made to the state of Michigan. Thomas said if he did not meet with him, he would send a complaint to the State of Michigan. About a week later, Balatzis received a fax and time ticket and a note indicating that wages were not being properly paid.

185. Thomas again told Balatzis that he should sit down with the Union, and Thomas told him that if they did so, he would tell Balatzis "who the snitch is in your company."

186. Subsequently, the union plant, Roberto Gonzalez filed thirteen prevailing wage complaints against FPI.

187. In the spring of 2006, FPI let its Hispanic workers go.

188. The Union has not contacted Balatzis or FPI since they released their Hispanic workers.

189. Balatzis problems with the Union started when he hired Hispanic workers and stopped close to the time he released them.

190. The Union targeted FPI, in part, because it hired Hispanic workers.

191. The Union disproportionately targets companies that have Hispanic workers, as evidenced in part, by the fact that its only "plant" is Hispanic.

D. Damages

192. The CBA covers preparatorial work, wall washing, painting, hanging of wallpaper, or wall covering, removal of wallpaper or paper cleaning. The CBA also benefits nonunion members if they work for a contractor who is a signatory to the CBA.

193. The Union and IES, by Mr. Llamas as President, signed a CBA dated October 5, 1998.

194. Mr. Llamas signed the CBA as a personal guarantor

195. The CBA was a collective bargaining agreement negotiated between the Union and the MAUPC. As of May 31, 2004, approximately ninety painting companies were signatories to the CBA with the Union.

196. IES was pressured by the Union to submit fringe benefit contributions of approximately $56,356.27 for June and July 2004, but complained that it was extortion by the Union. Indeed, he communicated this to Thomas.

197. The amount of fringe benefits and liquidated damages IES owes based on the audit, independent of any alter ego issues, is $6,500, for individuals who worked solely for IES.

198. On December 14, 2004, the Trustees voted to conduct a comprehensive audit of IES. A comprehensive audit can only be performed if the Trustees vote to conduct it.

199. The Trustees issued a June 16, 2005 debit memo of $406,481.31.

200. Mr. Ruehle met with Mrs. Llamas regarding the audit. Based upon their meeting and his review of documents she presented, he prepared and issued a January 4, 2006 revised debit memo which reflected a lower amount of $378,771.81. The revised comprehensive audit memo noted only those employees who were painters or Union members.

201. The Trustees' revised calculation in light of the Court's order finding the contract terminated on May 31, 2004, is $186,781.62. It consists of unpaid fringe benefits of $155,651.35 and liquidated damages of $31,130.27, and presumes that TLG is an alter ego of IES. Although the Fund did not submit a revised memo stating this number, this value is reflected in the monthly breakdown of the January 4, 2006 memo.

II. CONCLUSIONS OF LAW

A. Alter Ego

202. The alter ego doctrine is most commonly used in labor cases to bind a new employer that continues the operations of an old employer in those cases where the new employer is "merely

a disguised continuance of the old employer." *NLRB v. Fullerton Transfer & Storage*, 910 F.2d 331, 336 (6th Cir. 1990) (quoting *Southport Petroleum, Co. v. NLRB*, 315 U.S. 100 (1942)); *see also Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel and Rest. Employees, and Bartenders Int'l Union*, 417 U.S. 249, 259 n. 5 (1974).

203. The term also is applied to so-called double-breasted operations to determine whether two or more coexisting employers performing the same work are in fact one business, separated only in form. *Fullerton*, 910 F.2d at 336 n.7; *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 587 n.12 (6th Cir. 2006).

204. In both instances, the test is "whether the two enterprises have substantially identical management, business, purpose, operation, equipment, customers, supervision and ownership." *Fullerton*, 910 F.2d at 336 (quoting *Nelson Elec. v. NLRB*, 638 F.2d 965, 968 (6th Cir. 1981)); *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 580 (6th Cir. 1986).

205. "No factor is controlling and all need not be present." *Allcoast*, 780 F.2d at 579. The analysis is "flexible" and "no element should become a prerequisite to imposition of alter ego status; rather, all the relevant factors must be considered together." *Id.* at 582; *see also Yolton*, 435 F.3d at 587. The alter ego analysis requires the "examination of all the circumstances of each case, and a weighing of all the relevant factors." *Allcoast*, 780 F.2d at 581.

206. Examination of Sixth precedent reveals a potential conflict between the holdings of two panels. In 1986, the Sixth Circuit in *Allcoast* held that intent is *not* a dispositive factor in the alter ego analysis. Subsequently, in *Resilient Floor Decorators Insurance Fund v. A & M Installations, Inc.*, the Sixth Circuit held facts could not support a finding of alter ego liability if there was not "an intent to evade" because it was "clearly the focus of the alter ego doctrine." *Trs. of the Resilient Floor Decorators Ins. Fund v. A & M Installations, Inc.*, 395 F.3d 244, 248 (6th Cir. 2005).

207. *Resilient* held that the absence of some "indication that the relationship between [the companies] has changed over the years or has caused the [union] to receive less than that for which it bargained," there is no inequity that would justify a court's imposition of liability. *Id.* The court concluded "because [there was no] alleg[ation] . . . that [the defendant] concealed its close relationship with [the other company] and because there is no indication that [the union] ha[d] not received the full benefit of its collective bargaining agreement[,] . . . the application of the alter ego doctrine [was] inappropriate . . . ." *Id.*

208. It appears *Resilient* did not so much make the intent factor more dispositive when a union company follows a non-union company, so much as find the entire application of the alter ego doctrine not appropriate, when a union company follows a non-union company and there is no preexisting labor obligation. The

reasoning appears grounded in a concern about whether there is a labor agreement in place when the second company is created, as a negotiating party aware of a double-breasted operation is on notice and can bargain for the prohibition of subcontracting. *See also Mass. Carpenters Cent. Collection Agency v. A.A. Bldg. Erectors, Inc.*, 343 F.3d 18, 22 (1st Cir. 2003).

209. This court has already distinguished *Resilient's* harsh intent holding as inapplicable where a non-union company is formed after a union company that had preexisting obligations under a collective bargaining agreement. *See Trs. of the Painters Union Deposit Fund v. Interior / Exterior Specialists Co.*, No. 05-70110, 2007 U.S. Dist. LEXIS 21597, at *14 (E.D. Mich. Mar. 27, 2007) (Roberts, J.) ("IES and TLG represent the inverse of *Resilient Floor* and *McCarthy*. TLG, a nonunion company, was incorporated in 1999 after IES signed the CBA"); *Cement Masons' Pension Trust-Fund v. McCarthy*, No. 04-74006, 2006 U.S. Dist. LEXIS 17008 (E.D. Mich. Mar. 24, 2006) (citing *Resilient*, 395 F.3d 244).

210. The Sixth Circuit's decision in *Allcoast* preceded *Resilient*, and the Court explicitly held that "a finding of employer intent is not essential or prerequisite to imposition of alter ego status." *Mich. Glass & Glazing Indus. Defined Contribution*, 2008 U.S. Dist. LEXIS 13253, at *30 (citing *Allcoast*, 780 F.2d at 581).

211. *Allcoast* did not so much allow a finding of alter ego status *without* intent, as it held the

presence of other factors could *infer intent*. *See Allcoast*, 780 F.2d at 583.

212. However, if a showing can be made that an employer intended to circumvent its labor obligations, it lends considerable support to an alter ego finding. *NLRB v. Crossroads Elec., Inc.*, No. 05-1395, 178 Fed. Appx. 528, 534 (6th Cir. May 5, 2006) (unpublished) (citing *Allcoast*, 780 F.2d at 581); *Fullerton*, 910 F.2d at 337).

213. Because TLG, a non-union company, was formed after IES, a union company, *Resilient's* intent holding cannot directly apply here.

214. The Court may consider the time period covered by the settlement agreement to determine whether IES and TLG are alter egos. *See also Interior/Exterior Specialists*, 2007 U.S. Dist. LEXIS 21597, at *17.

215. IES and TLG have technically distinct owners. This factor initially weighs against a finding of alter ego liability. Nonetheless, in establishing common ownership, ownership by members of the same family may be considered. *See Northwestern Ohio Adm'rs v. S.E.A. Builders Corp.*, No. 99-7406, 2001 U.S. Dist. LEXIS 17930, at *13-15 (N.D. Ohio Oct. 31, 2001) (citing *Pipe Fitters Union Local No. 392 v. Aggressive Piping, Corp.*, 841 F. Supp. 224, 227 (S.D. Ohio 1991)); *Central States Southeast & Southwest Areas Pension Fund*, 902 F.2d 593, 597 (7th Cir. 1990); *Crawford Door Sales*, 226 N.L.R.B. 1144 (1976); *but see Gen. Longshore Workers, Local 1988 v. Pate Stevedore Co.*, No.

91-30292, 1993 U.S. Dist. LEXIS 18638, at *18 (N.D. Fla. Dec. 30, 1993).

216. While there is technically different ownership of IES and TLG, the separate ownership is not as firm as would usually be the case between two distinct companies. This factor only weighs slightly in favor of IES and TLG.

217. While there is technically different management of IES and TLG, these managerial distinctions are not as firm as would usually be the case between two distinct companies. This factor only weighs slightly in favor of IES and TLG.

218. IES and TLG have generally separate business purposes. Nevertheless, their purposes are not mutually exclusive. Their work can overlap, albeit in the separate roles of general contractor or subcontractor. Although TLG's painting work was not a significant portion of its work, IES and TLG both engaged in painting before their settlement with the union. This factor weighs slightly in favor of IES and TLG. *See also Roofers Local 149 Sec. Trust Fund v. Duane Smelser Roofing Co.*, 285 F. Supp. 2d 936, 941 (E.D. Mich. 2003).

219. IES and TLG generally have different paid supervisors. However, Mr. Llamas' occasional supervision of TLG projects undercuts this factor. This factor weighs slightly in favor of the Trustees.

220. IES and TLG have separate field and office equipment.

221. Aside from work subcontracted from TLG to IES, IES and TLG have some of the same customers. This factor weighs slightly in favor of the Trustees.

222. The operations factor weighs heavily in favor of the Trustees.

223. The Court finds the most analogous case to the facts before it is *Wilson v. Int'l Bhd. of Teamsters*, 83 F.3d 747 (6th Cir. 1996). In *Wilson*, the Sixth Circuit upheld a finding of alter ego liability where the two corporations: (1) shared the same corporate headquarters; (2) exchanged employees; (3) one official periodically represented the other during labor negotiations; and (4) one official supervised the truck drivers hired by the other. *Wilson*, 83 F.3d at 759. Notably, there was no consideration of intent to evade.

224. The relationship between IES and TLG offers the same amount of evidence supporting alter ego liability. IES and TLG share the same office space (although they have separate facilities within it) and they have "exchanged employees;" the same people worked for both to a substantial degree. Thus, the facts meet the first two major points in *Wilson*. Although it is not the case that one official periodically represented the other during labor negotiations or that one official supervised the truck drivers hired by the other," IES and TLG: (1) have substantial undocumented/inaccurate inter-company transactions and financial records; (2) Mr. Llamas can sign checks for TLG, and Ms.

Llamas can sign checks for IES; (3) Mr. Llamas appears on the payroll of TLG and Ms. Llamas appears on the payroll of IES; (4) Mr. Llamas has sometimes supervised TLG projects; (5) IES takes care of many of the bills and maintenance for the building for an arbitrary management fee; (6) Mr. and Ms. Llamas both own the building that IES and TLG rent; (7) Mr. Llamas occasionally helps unload equipment or deliveries for TLG; (8) employees from each company sometimes answer the phone for the other; and (9) there is some limited evidence of intent to evade the CBA through subcontracting from IES to TLG.

225. In *Resilient*, the court determined that, even if it were to conclude that the alter ego doctrine applied when the union company came after the non-union company, there was no alter ego liability where: (1) the defendants' shared office and warehouse space, (2) shared equipment and office staff; and (3) one loaned the other $ 5,000 to post a security bond with the union to fulfill a condition of its collective bargaining agreement fell "short of the kind of pervasive intermingling of funds and operations necessary to support a finding that two companies are alter egos of one another. *Cement*, 2006 U.S. Dist. LEXIS 17008, at *18-19 (citing *Resilient*, 395 F.3d at 249).

226. More facts supporting alter ego are present. IES and TLG: (1) share the same office space (although they have separate facilities within it); (2) jointly own the building they use as their office; (3) have a financial relationship

analogous to the "pervasive intermingling of funds" absent in *Resilient*; and (4) shared staff during a significant period of time to a substantial degree.

227. Although IES and TLG do not share equipment, unlike *Resilient*, there is evidence of intent to evade. In addition, Mr. and Mrs. Llamas both appeared on the payroll of their spouses' company, and Mr. Llamas supervised TLG employees on a few occasions.

228. After consideration of Sixth Circuit precedent and all the relevant factors, the Court finds that IES and TLG are alter egos.

229. The Court **GRANTS** the Trustees' claim for delinquent fringe benefit payments based on an alter ego theory under 29 U.S.C. § 1145.

B. Defamation and Preemption

230. In this Court's previous order, *Trs. of the Painters Union Deposit Fund v. Interior Exterior/Specialists Co.*, No. 05-70110, 2007 U.S. Dist. LEXIS 21590, at *17-22 (E.D Mich. Mar. 27, 2007) (Roberts, J.), it considered the preemption of IES and TLG's defamation claims under the National Labor Relations Act, 29 U.S.C. § 141, *et seq*, ("NLRA"). The Court held these claims were not precluded under §§ 7 or 8 of the NLRA. *Id.*; 29 U.S.C. §§ 157-158.

231. Neither party raised preemption under § 301 of the Labor Management Relations Act in a motion prior to their trial briefs, nor did the

Court previously consider preemption under this section. The Union first raised the issue in its trial brief. Judge Lawson addressed the application of § 301 issue in an order for the previously discussed case against IES and TLG. Judge Lawson found that the Sixth Circuit held "[t]he Supreme Court . . . require[s] federal preemption of state law-based actions . . . [when those actions are] inextricably intertwined with consideration of the terms of the labor contract.'" *Interior/Exterior Specialist Co. v Local 334 of the Laborers Int'l Union of N. Am.*, No. 06-14154, 2007 WL 851771, at *6 (E.D. Mich. Mar. 21, 2007) (quoting *Mattis v. Massman*, 355 F.3d at 905).

232. Considering IES' defamation claims, Judge Lawson held:

> To determine whether a state-law claim is sufficiently "independent" to survive § 301 preemption, this court has adopted a two-step inquiry. First, courts must determine whether resolving the state-law claim *would require interpretation of the terms of the collective bargaining agreement. If so, the claim is preempted.* Second, courts must ascertain whether the rights claimed by the plaintiff were created by the collective bargaining agreement, or instead by state law. If the rights were created by the collective bargaining agreement, the claim is preempted. In short, if a state-law claim fails *either* of these two requirements, it is preempted by § 301.

Local 334, 2007 WL 851771, at *6 (emphasis added and in original) (internal citations omitted) (quoting *Mattis v. Massman*, 355 F.3d at 905).

233. Applying this test to IES' defamation claims, Judge Lawson held:

> A plaintiff bringing a defamation claim [under Michigan law] must plead and prove four elements: "(a) a false and defamatory statement concerning plaintiff; (b) an unprivileged communication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod)." The defendant's statements that the plaintiff alleges are defamatory concerned the plaintiff's failure to satisfy its fringe benefit obligations as required by the CBA. The plaintiff must prove that the statements were false, which it proposes to do by showing that it terminated the CBA according to its terms before the 2003-2006 contract went into effect. Plainly, "resolving the state-law claim would require interpretation of the terms of the collective bargaining agreement"; the defamation count consequently is pre-empted by section 301.

Id. (quoting *New Franklin Enter. v. Sabo,* 480 N.W.2d 326, 328 (Mich. Ct. App. 1991)).

234. The Union's reliance on Judge Lawson's decision has merit.

235. "[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim or dismissed as pre-empted by federal labor-contract law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985) (internal citation omitted) (citing *Avco Corp. v. Aero Lodge 735*, 390 U.S. 557 (1968)).

236. If IES and TLG's defamation claims are preempted by § 301, they must be dismissed, at least, because they did not plead a § 301 claim in their complaint, and their defamation claims were not filed within the six month limitations period.

237. Dismissal for lack of subject matter jurisdiction may occur at any time. *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 571 (2004); *see also Doe v. Lexington-Fayette Urban Co. Gov't*, 407 F.3d 755, 761 (6th Cir. 2005).

238. IES' defamation claims do not necessarily require interpretation of the CBA for two reasons: (1) payment of fringe benefits is also mandated by state law as part of the prevailing wage; and (2) in some instances the obligation to pay fringe benefits continues after the termination of a collective bargaining

agreement. *See e.g., Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662, 668-669 (7th Cir. 2003).

239. Thomas' statements at the Patrick Henry School are preempted by section 301. Thomas referenced IES' obligations to pay fringe benefits to the Union based on a CBA. The only manner IES can challenge the truth of this statement is to argue the CBA terminated and/or interpret the CBA to dispute the terms of any continuing obligation to pay benefits to Fund after termination. IES failed to plead a section 301 claim, and in any event, filed its claim after the expiration of the six month statute of limitations.

240. Thomas' statements at Western Michigan University are preempted under section 301. Thomas clearly referenced IES' obligation to pay fringe benefits to the Union under the CBA when he suggested payment through joint checks issued in the name of IES and the Union's Fund. The only manner IES can challenge the truth of this statement is to argue the CBA terminated and/or interpret the CBA to dispute the terms of any continuing obligation to pay benefits to the Fund after termination. IES failed to plead a section 301 claim, and in any event, filed its claim after the expiration of the six month statute of limitations.

241. Thomas' statements at Wayne State University that TLG did not pay its employees the prevailing wage are not preempted by section 301 because they do not require interpretation

of a collective bargaining agreement. TLG was not a signatory to a collective bargaining agreement, and TLG's efforts to prove these statement were false do not require the interpretation of a CBA.

242. In *Garmon*, the Supreme Court held that "when an activity is arguably subject to § 7 or § 8 of the Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

243. The Supreme Court "limit[ed] the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." *Linn v. United Plant Guard Workers*, 383 U.S. 53, 64-65 (U.S. 1966)

244. "[A]ctual malice" . . . is . . . knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

245. Thomas could not have know whether or not his statement about TLG was true.

246. In order to satisfy the reckless disregard test of actual malice, TLG is required to present evidence that the statements were published with a high degree of awareness of probable falsity and that the Union in fact entertained

serious doubts as to the truth of the matter published. *Gaynes v. Allen*, 339 N.W.2d 678 (Mich. Ct. App. 1983) (quoting *Garrison v. Louisiana*, 379 U.S. 64 (1964)).

247. "[M]alice must exist at the time of the original libelous publication." *Peisner v. Detroit Free Press, Inc.*, 304 N.W.2d 814, 816 (Mich. Ct. App. 1981); *Sullivan*, 376 U.S. at 286.

248. TLG must prove malice by clear and convincing evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-256 (1986).

249. Thomas could not have known whether or not TLG was paying "fair wages," in this case reasonably construed as the prevailing wage, based solely on the fact that TLG was not a union company. However, Thomas had some reasonable grounds to think TLG was not paying the prevailing wage. TLG appeared to be doing work that should have been done by IES. Thomas reasonably held "serious doubts" that TLG *was paying* the prevailing wage. There are not many reasons for IES to subcontract painting to TLG, a non-union company, in violation of the CBA, unless TLG was paying less than the prevailing wage IES was obligated to pay. Even if there were reasons, it was reasonable for Thomas to assume TLG was paying less than the prevailing wage.

250. Although Thomas may have been negligent, TLG did not prove, by way of clear and convincing evidence, that he made his statement with malice.

251. Even if IES' claims for defamation were not preempted by section 301 they are preempted under *Garmon*. IES did not prove by clear and convincing evidence that these alleged defamatory statements were made with malice.

252. IES and TLG's counterclaims for defamation are **DENIED**.

C. **Restitution**

253. After trial, the Trustees advance an argument never mentioned in: (1) their previous motions; (2) the Joint Pretrial Statement; (3) their trial brief; or (4) at trial. Citing Judge Lawson's decision in *Laborers Pension Trust Fund - Detroit & Vicinity v. Interior Exterior Specialists Constr. Group, Inc.*, 479 F. Supp. 2d 674 (E.D. Mich. 2007), also a case against IES, the Trustees argue IES' counterclaim for restitution is barred by section 515 of ERISA. 29 U.S.C. § 1145.

254. Section 515, titled "Delinquent contributions," states:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.
>
> 29 U.S.C. § 1145.

255. The Trustees argue IES' "defense" to its action under section 515 is unavailable under Sixth Circuit precedent because the claim cannot be resolved by the "cursory review" required by section 515. *See Plumbers & Pipefitters Local Union No. 572 Health & Welfare Fund v. A & H Mech. Contrs.*, No. 02- 6131, 100 Fed. Appx. 396, 402 (6th Cir. June 1, 2004) (unpublished) (citing *La. Bricklayers & Trowel Trades Pension Fund & Welfare Fund v. Alfred Miller Gen. Masonry Contracting Co.*, 157 F.3d 404, 408 (5th Cir. 1998)); *see also Trs. of the B.A.C. Local 32 Ins. Fund v. Norwest Tile Co.*, No. 042436, 2005 U.S. App. LEXIS 27879, at *13-17 (6th Cir. Dec. 14, 2005) (unpublished).

256. The Trustees' argument is misplaced. IES' action is not a defense to a payment of delinquent benefits, but a *counterclaim* for an *overpayment* of previously paid benefits. IES does not bring its counterclaim for restitution pursuant to section 515. Instead, in the Sixth Circuit, IES' counterclaim for restitution arises from federal common law. *See Whitworth Bros. Storage Co. v. Central States, Southeast & Southwest Areas Pension Fund (Whitworth I)*, 794 F.2d 221 (6th Cir. 1986); *Whitworth Bros. Storage Co. v. Cent. States, Southeast & Southwest Areas Pension Fund (Whitworth II)*, 982 F.2d 1006 (6th Cir. 1993). Despite the use of eight pages of its amended proposed findings of fact and conclusions of law to advance the point, the Trustees' argument that section 515 bars this court from considering IES' claim for restitution is without merit.

257. Even if the section 515 analysis was relevant to an action attempting to recoup a previous overpayment, the Trustees' argument is also waived because it was not raised until after trial. The Court has jurisdiction under federal common law to hear an action for restitution of fund overpayments. *Whitworth I*, 794 F.2d at 236. The Trustees' argument cannot be properly characterized as a jurisdictional argument that can be raised at any time. *Grupo*, 541 U.S. at 571; *see also Lexington-Fayette*, 407 F.3d at 761.

258. Thus, the Trustees' section 515 argument is otherwise waived because it is properly characterized as an argument that IES failed to state a claim, and the Trustees failed to raise the issue before the conclusion of trial. *See Ausel v. Unisys Corp.*, No. 96-2062, 1997 U.S. App. LEXIS 32771, at *6 (6th Cir. Nov. 13, 1997) (unpublished) (citing FED. R. CIV. P. 12(h)(2)) ("[A] motion to dismiss for failure to state a claim under Rule 12(b)(6) may be timely made *as late as trial*.") (emphasis added).

259. ERISA permits the refund of overpayments to employers when a defendant brings a claim for overpayment based on mistake of law or fact. 29 U.S.C. § 1103(c)(2)(A)(ii); *Whitworth II*, 982 F.2d at 1011. "The Act itself does not define such mistakes," but it is clear that Mr. Llamas did not make a "mistake" of fact or law when he made these payments. *Cent. States v. Wholesale Produce Supply Co.*, 478 F. Supp. 884, 887 (D. Minn. 1979); *see also Crews v. Cent. States, Southeast & Southwest Areas Pension Fund*, 788 F.2d 332, 337 (6th Cir. 1986).

260. A "mistake" is "some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence. A mistake exists when a person under some erroneous conviction of law or fact, does, or omits to do, some act which *but for the erroneous conviction*, he would not have done or omitted." Black's Law Dictionary 903 (5th ed. 1979) (emphasis added).

261. Mr. Llamas claimed at trial that he did not believe IES was bound by the CBA. at the time he agreed to make the payments. Mr. Llamas did not argue he believed IES was obligated by law to make the payments it now seeks to recover. Despite the availability of a claim under federal common law for restitution of ERISA overpayments, trial made clear that Mr. Llamas paid these benefits on behalf of IES under protest, not because of a "mistake" of fact or law.

262. Even if IES did make an overpayment based on a mistake of fact or law, the record does not show it ever made a formal request for a refund to the fund prior to filing its counterclaim. As a result, IES' claim for restitution also fails for failure to exhaust administrative remedies. *See Whitworth (II)*, 982 F.2d at 1019.

263. IES' counterclaim for restitution is **DENIED**.

D. Racial Discrimination

264. TLG does not have a claim in its complaint under 42 U.S.C. § 1981. The Union was entitled

to raise the failure to state a claim at any point before the conclusion of trial, which it did. FED. R. CIV. P. 12(b)(6).

265. The protections of § 1981 extend to "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

266. Section 1981 covers claims for discrimination based on Hispanic racial identity, ethnicity, or ancestry. *See Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987); *Erebia v. Chrysler Plastic Prod. Corp.*, 772 F.2d 1250, 1253 (6th Cir. 1985).

267. This claim is appropriately framed as the disparate treatment of IES compared to other union CBA signatories and/or former signatories, based on the racial identity of IES and/or its willingness to hire persons of Hispanic origin.

268. IES may bring a claim as a corporation under § 1981 because it is Hispanic owned and controlled. *See Florence Urgent Care v. HealthSpan, Inc.*, 445 F. Supp. 2d 871, 877 (S.D. Ohio 2006). It may also assert a claim of retaliatory discrimination if adverse actions are taken against it because it hires Hispanic employees. *See Airbrush Express, Inc. v. Jefferson Mall Co., L.P.*, No. 03-691, 2005 U.S. Dist. LEXIS 44785, at *13 (W.D. Ky. June 30, 2005).

269. It is not clear that Sixth Circuit precedent protects against private discrimination because of alienage under § 1981. *See Camara v. Schwan's Food Mfg.*, No. 04-121, 2005 U.S. Dist. LEXIS 44783, *15-16 (E.D. Ky. Aug. 15, 2005). In any event, IES' complaint does not mention alienage discrimination, and so discrimination against non-citizens because of their status is not at issue.

270. The failure to provide the UAP in languages other than English is not standing alone, circumstantial evidence of racial discrimination. Unlike Title VII, 42 U.S.C. § 1981 does not support claims of disparate impact. The fact that non-English speaking persons have to pay for an English-only apprentice program in which they cannot participate, while perhaps unfair and unreasonable, is evidence of language discrimination (against all non-English speakers), not race discrimination.

271. The Court is aware of the holding of the Supreme Court that "[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, [could] be treated as a surrogate for race under an equal protection analysis." *Hernandez v. New York*, 500 U.S. 352, 371 (1991). It is also aware of the equal protection holding in *Olagues v. Russoniello*, 797 F.2d 1511, 1521 (9th Cir. 1986), which suggests the targeting of only Spanish-speakers could serve as a proxy for race (albeit in combination with additional characteristics). However, IES does not cite to either of these cases, or a single case

within the Sixth Circuit permitting the use of language as a proxy for race under § 1981, such that the Court could hold that the provision of educational materials in only Spanish could constitute evidence of disparate treatment based on race. For the Court to advance into this new terrain would have required a more pointed argument, and indeed, additional information on the characteristics and language abilities of the employees of IES.

272. In order to prove its claim IES must establish: (1) membership in a racial minority; (2) that the Union intended to discriminate on the basis of race; and (3) discrimination concerning one of the activities enumerated in § 1981. *Mitchell v. Toledo Hosp.* 964 F.2d 577, 582 (6th Cir. 1992).

273. The Court applies the traditional *McDonnell Douglass* analysis to claims of racial discrimination under § 1981. *See Burks v. Yellow Transp., Inc.*, No. 07-3201, 2008 U.S. App. LEXIS 518, at *14 n.4 (6th Cir. Jan. 8, 2008) (unpublished) (citing *Noble v. Brinker Int'l, Inc.*, 391 F.3d 715, 720 (6th Cir. 2004)).

274. "A plaintiff may establish a claim of discrimination either by introducing direct evidence of discrimination, or by proving circumstantial evidence which would support an inference of discrimination." *Johnson v. Univ. of Cincinnati,* 215 F.3d 561, 572 (6th Cir. 2000)

275. IES does not offer direct evidence of discrimination. *See Jacklyn v. Schering Plough*

Healthcare Prods. Sales Corp., 176 F.3d 921, 926 (6th Cir. 1999).

276. To prevail on a claim of race discrimination under § 1981 based on circumstantial evidence, a plaintiff must meet the tripartite standard of proof for Title VII cases established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *Jackson v. Quanex Corp.*, 191 F.3d 647, 658 (6th Cir. 1999); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992).

277. "The proof required to make the prima facie case required by the *McDonnell Douglas* burden shifting analysis varies depending on the claims and facts asserted." *Mitchell v. Toledo Hosp.* 964 F.2d 577, 582 (6th Cir. 1992).

278. IES' precise allegation of differential treatment by the Union does not fit comfortably within traditional prima facie structures.

279. However, the Court finds the best formulation is to require IES to establish a prima facie case by showing that: (1) it is a member of a protected class; (2) it sought to make, enforce, or terminate a contract in a manner generally engaged in by painting companies in relation to unions; and (3) the Union treated it different from similarly-situated "non-Hispanic corporations" outside the protected class. *See Florence Urgent Care v. HealthSpan, Inc.*, 445 F. Supp. 2d 871, 877 (S.D. Ohio 2006).

280. IES establishes a prima facie case of discrimination through circumstantial evidence.

281. There is some circumstantial evidence that IES, a Hispanic-owned and controlled company, was treated differently than non-Hispanic companies while it was participating in the Union pursuant to the terms of the CBA.

282. There is some circumstantial evidence that IES, a Hispanic-owned and controlled company, was treated differently than non-Hispanic companies when it attempted to terminate its contract.

283. IES attempted to withdraw from the CBA with timely notice to the Union. IES did so in accordance with the CBA. IES attempted to exercise this contractual right in a manner generally engaged (in fact necessarily engaged in according to the CBA) by painting companies in relation to unions. However, it was met with strong resistance.

284. As a result, the burden of production shifts to the Union to articulate some legitimate, nondiscriminatory reason(s) for the adverse actions. *See id.*; *cf. EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 862 (6th Cir. 1997) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252 (1981)).

285. Because the Union in fact meets this burden by stating it treated IES differently because of Kennedy's anger, and pursuant to legitimate union organizing and CBA enforcement

activities, the burden shifts back to IES to show that the Union's stated reasons for its adverse actions were in fact a pretext. In order to prove pretext "the plaintiff may not rely simply upon his prima facie evidence but must, instead, introduce additional evidence of discrimination." *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)

286. IES must show by a preponderance of the evidence either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate the [the Union's] actions, or (3) that they were *insufficient* to motivate the Union's actions. *Id.* (emphasis in original).

287. IES did not substantively argue the first prong.

288. IES' argument fails under the second prong because it has not put forward evidence of pretext such that "the sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a pretext, or coverup" or that "the strength of his circumstantial evidence . . . overwhelms [the Union's] non-discriminatory reasons." *Id.* at 1084.

289. The third prong may be met by evidence that other Painting companies, not in the protected class of Hispanic-owned companies, were treated differently even though they engaged in substantially identical conduct to that which the Union contends motivated its adverse actions. *Id.*

290. However, IES has not offered evidence of similarly situated companies either in regard to the enforcement or termination of its contract: (1) the work of the additional Madias companies was covered by an agreement with a union (albeit not the Painters Union); (2) the Lancaster Company never became an active painting company; (3) an alter ego charge was not lodged with the NLRB against any of the companies; (4) the Duross companies never withdrew from the Union; (5) none of these companies settled an alter ego claim against them and then withdrew from the Union; and (6) Forrest Painting is non-union.

291. Kennedy testified he needed evidence such as pay stubs to request a full audit of a painting company. Mr. Llamas did not provide the Union with documentary evidence of his claims since the time he was a journeyman painter before he owned IES.

292. A motivating factor of the Union's response was the Hispanic identity of IES. However, the Court finds the Union would have still responded in the same manner, even if IES did not have a Hispanic identity because: a formal NLRB charge had been made against IES by a painting employee; (2) the Union had entered into a settlement to resolve this charge under the assumption IES would remain in the Union; (3) IES' withdrew from the Union; (4) this withdrawal angered Kennedy for a variety of reasons; (5) the Union does not aggressively enforce its own CBA without the filing of a formal complaint by a Union member.

293. The fact that the Union would have taken the same action precludes liability under 42 U.S.C. § 1981. *See Carey v. Fedex Ground Package Sys., Inc.*, 321 F. Supp. 2d 902, 915-918 (S.D. Ohio 2004).

294. The Court **DENIES** IES' crossclaim for racial discrimination under § 1981.

E. Damages

295. Mr. Llamas, IES, and TLG are jointly and severally liable for delinquent fringe benefits of $155,651.35 and liquidated damages of $31,130.27 under the Trustees' alter ego claim.

IV. CONCLUSION

296. The Court **GRANTS** The Trustees' claim for unpaid fringe benefits under an alter ego theory. The Trustees are entitled to $186,781.62 in unpaid fringe benefits. The Court **DENIES** IES' counterclaim for restitution, and IES and TLG's crossclaims for defamation and racial discrimination.

IT IS ORDERED.

s/Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: March 18, 2008

The undersigned certifies that a copy of this document was served on the attorneys of record by electronic means or U.S. Mail on March 18, 2008.

s/Linda Vertriest
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No: 05-70110
Honorable Victoria A. Roberts

[Filed March 27, 2007]

TRUSTEES OF THE PAINTERS UNION DEPOSIT FUND,	)
Plaintiff,	)
vs	)
INTERIOR/EXTERIOR SPECIALISTS COMPANY, ET AL,	)
Defendants,	)

OPINION AND ORDER

I. INTRODUCTION

This matter is before the Court on Defendants' Motion for Partial Summary Judgment (Doc. #86). For the following reasons, the Court **DENIES it in part and Grants it in part**.

II. BACKGROUND

This is an action to collect fringe benefit contributions and liquidated damages for late payments allegedly owed by Defendants, Interior/Exterior Specialist Co. ("IES") and The Llamas Group, Corp. ("TLG"). IES entered into a collective bargaining agreement ("CBA") with Painters District Council No. 22 of the International Brotherhood of Painters and Allied Trades, AFL-CIO ("the Union"), dated October 5, 1998. Plaintiff alleges that TLG, owned and operated by Julie Llamas, wife of Rito Llamas, is the alter ego of Defendant IES and is liable for payments under the CBA. Plaintiff also alleges that Rito Llamas ("Rito") is liable as a personal guarantor under the CBA.

IES is a minority owned and controlled Michigan corporation with a predominately Hispanic workforce. Incorporated since 1997, IES provides painting services and selective demolition. Rito is the sole shareholder and director of IES.

Defendant TLG was incorporated in 1999. It is a nonunion general contracting firm whose work includes design, building, concrete work, masonry work, and some painting. Julie Llamas is the president and sole shareholder of TLG. TLG and IES share the same principal place of business at 7343 Allen Road, Allen Park, Michigan. They also share office and warehouse space in the same building. Rito and Julie Llamas together own the building in which IES and TLG operate. TLG pays monthly rent. The record is unclear as to whether the rent payments are paid to Rito and Julie Llamas or the deed holder of the property. Occasionally, both companies share

employees when work is low. Rito and Julie Llamas together maintain the IES check register. Julie Llamas has permission to withdraw cash and write checks from an IES account. Rito Llamas also sometimes writes and signs checks for TLG. They have different phone numbers. Each company informally loans the other monies. IES and TLG do not share common equipment, and neither IES nor TLG uses the other's equipment.

As a union shop, IES is required by the terms of CBA to make regular employee fringe-benefit contributions to the trust maintained by the Trustees of the Painters Union Deposit Fund ("Plaintiff" or "Trustee"). These contributions are calculated based on the hours worked by IES employees.

IES and TLG dispute they owe money under the CBA. The CBA expired on May 31, 2003. By agreement of the parties, the contract was extended for one year, until May 31, 2004. For termination, the CBA required at least 60 days notice prior to the anniversary date of the extension. On August 21, 2003, the Union filed a Charge Against Employer with the National Labor Relations Board against "Interior/Exterior Specialist d/b/a Llamas Group." (The "2003 Charge") The Union claimed that for six months IES and TLG operated as an illegal double-breasted operation, and failed to pay members union wages and fringe benefits under the CBA.

In February of 2004, the Trustee filed suit alleging that IES violated "a contract between an employer and labor organization representing employees in an industry affecting interstate commerce." The Trustee also sought to compel a comprehensive audit of IES's

books and records, claiming that IES was indebted to it for fringe benefit contributions and liquidated damages.

On March 23, 2004, IES notified the Union that it would no longer be a party to the CBA effective May 31, 2004. IES asserts this is the date on which the CBA terminated. The Union and the Trustee both argue that the CBA did not terminate.

On May 21, 2004, TLG, IES, and the Union entered into a settlement agreement concerning the 2003 Charge. As a condition of the settlement agreement, TLG agreed that it "[would] no longer serve as a painting contractor and [would] subcontract any painting work it might acquire to either Interior Exterior Specialists or to a contract[or] that has a labor contract with [the Union]." The Union agreed to withdraw the pending unfair labor practice charge and recommend that the Trustee dismiss its lawsuit. The Trustee agreed to dismiss the lawsuit and a dismissal without prejudice was entered on June 4, 2004.

On September 16 and 21, 2004, IES submitted two checks totaling $56,356.27 to the Trustee for June and July fringe benefits. Simultaneously, on September 16, 2004, Rito Llamas sent a letter to the Union stating that the June and July payments were submitted pursuant to the settlement agreement. Further, in his correspondence, Rito Llamas reiterated that the payments in "no way reflect a desire to continue a contract or to extend the contract per [the] letter dated March 23, 2004 and received by your office on March 24, 2004."

On December 14, 2004, the Trustee received grievance reports from IES employees complaining that IES failed to deduct vacation benefits in November 2004. Based on this, the Trustee ordered a comprehensive audit on all books and related records of IES from September 1, 2001 to the date of completion of the audit, pursuant to the CBA. On January 11, 2005, this lawsuit was filed.

The Trustee seeks: (1) a comprehensive audit; (2) to collect delinquent fringe benefits and liquidated damages; and, (3) a finding that the IES and TLG are illegal alter egos. Defendants filed a counter claim against the Trustee and included the Union as a third-party defendant. Defendants' filed separate motions for summary judgment against the Trustee and the Union. In this Motion, Defendants request the Court find that the CBA terminated on May 31, 2004 and that IES and TLG are not alter egos.

III. STANDARD OF REVIEW

Under FED. R. CIV. P. 56(c), summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Copeland v. Machulis*, 57 F.3d 476, 478 (6th Cir. 1995). A fact is "material" and precludes a grant of summary judgment if "proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle[s] of law to the rights and obligations of the parties." *Kendall v.*

Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984). The court must view the evidence in the light most favorable to the nonmoving party and it must also draw all reasonable inferences in the nonmoving party's favor. *Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995).

The moving party bears the initial burden of showing that there is no genuine issue of material fact. *Snyder v. AG Trucking Co.*, 57 F.3d 484, 488 (6th Cir. 1995). To meet this burden, the movant may rely on any of the evidentiary sources listed in Rule 56(c). *Cox*, 53 F.3d at 149. Alternatively, the movant may meet this burden by pointing out to the court that the nonmoving party, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case, and on which that party will bear the burden of proof at trial. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937 (6th Cir. 1995); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989). The moving party does not, however, have to support its motion for summary judgment with evidence negating its opponent's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985).

Once the moving party has met its burden, the burden shifts to the nonmoving party to produce evidence of a genuine issue of material fact. Rule 56(e); *Cox*, 53 F.3d at 150. The nonmoving party cannot rest on its pleadings, but must present significant probative evidence in support of its complaint. *Copeland*, 57 F.3d at 479. The mere existence of a scintilla of evidence to support the nonmoving party position will be insufficient; there must be evidence on which a jury could reasonably find for the nonmoving party. *Snyder*, 57 F.3d at 488; *Tolton*, 48 F.3d at 941.

IV. APPLICABLE LAW AND ANALYSIS

A. Summary Judgment Is Not Appropriate As To Whether IES and TLG are Alter Egos

"The alter ego doctrine is most commonly used in labor cases to bind a new employer that continues the operations of an old employer in those cases where the new employer is 'merely a disguised continuance of the old employer.'" *NLRB v. Fullerton Transfer & Storage Ltd., Inc.*, 910 F.2d 331, 336 (6th Cir. 1990). The Sixth Circuit suggested in dicta that the alter ego doctrine might also be "applied to so-called double breasted operations to determine whether two or more coexisting employers performing the same work are in fact one business, separated only in form." *Id.* at 336 & n.7 (hypothesizing that the doctrine might be equally applicable "where a company operating a unionized work force establishes a second nonunionized company performing the same work in the same market under the same control").

To determine alter ego status, courts ask "whether the two enterprises have substantially identical management, business, purpose, operation, equipment, customers, supervision and ownership." *Id.* "No factor is controlling and all need not be present." *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 579 (6th Cir. 1986). The analysis is "flexible" and "no element should become a prerequisite to imposition of alter ego status; rather, all the relevant factors must be considered together." *Id.* at 582; *see also Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006).

The Trustee alleges that IES created TLG in order to capitalize on union contract opportunities while simulatenouesly evading the collective bargaining obligations faced by the other union employers. In support of its alter ego claim, Plaintiff provides affidavits, deposition testimony, and documentary evidence. The evidence presented to the Court indicates that IES and TLG share the same employees and operate out of the same building; that Rito and Julie Llamas own that building; the companies advance money to each other based on verbal agreements; that Julie Llamas is involved in the financial management of IES; that Rito Llamas is involved in the financial management of TLG; that the finances of both companies are substantially intertwined; and, that both IES and TLG are involved in painting work. Further, Plaintiff presents grievance reports and testimony from three employees who allege that fringe benefits were deducted from their paychecks but never paid to the Trustee.

Defendants' argue that as a matter of law TLG cannot be the alter ego of IES. Relying on two recent opinions, Defendants assert that there is no evidence that TLG was formed or operated with the intended purpose to evade preexisting contractual obligations with the Union. *See Trustees of the Resilient Floor Decorators Ins. Fund v. A & M Installations, Inc.*, 395 F.3d 244 (6th Cir. 2005); *Cement Mason's Pension Trust-Fund, Detroit & Vicinity v. McCarthy*, 2006 WL 770444 at *5 (E.D. Mich. 2006). Further, Defendants contend that there is no evidence that IES subcontracted TLG to do IES's work in order to avoid its obligations under the CBA. In addition, Defendants argue that while IES was a signatory to the CBA, it paid over $718,166.55 to Plaintiff and there is no

evidence that Plaintiff received less than the full benefits it was entitled to receive.

In short, Defendants contend that their actions do not give rise to alter ego status. In support, Defendants rely on *Trustees of the Resilient Floor Decorators Ins. Fund v. A & M Installations, Inc.*; and *Cement Mason's Pension Trust-Fund, Detroit & Vicinity v. McCarthy* ("McCarthy").

The *Resilient Floor Decorators* case, unlike this action, involved a nonunion company, Carpet Workroom and a later formed union company, A &M Installations. Carpet Workroom, sold carpet and flooring to commercial customers. John Lukasik founded the company in 1982. His brother-in-law was an employee from 1986 until he left the company in 2001 to devote his attention to A & M Installations, a unionized carpet and flooring installation company. Because Carpet Workroom often bid for sale of carpet on union projects, it frequently would subcontract its installation work to the unionized A&M. *Trustees of the Resilient Floor Decorators Ins. Fund,* 395 F.3d at 247.

Carpet Workroom and A & M - in addition to common projects and customers - shared office and warehouse space in the same building. *Id.* And, because of the physical proximity of the two companies' operations, they shared office equipment and personnel as well. Given this, Resilient Floor Decorators Union Trust funds argued that A & M and Carpet Workroom were alter egos of one another and that Carpet Workroom should be bound by the terms of the collective bargaining agreement signed by A & M, and should be required to make contributions

to the union trust funds based on the number of hours worked by Carpet Workroom employees. *Id.* at 248.

The Sixth Circuit was not persuaded. The Court stated that "Resilient Floor disregards the fact that 'an intent to evade' preexisting obligations is clearly the focus of the alter ego doctrine." *Id.* In holding that no alter ego relationship existed the Court found that "in the absence of some indication that the relationship between the companies has changed over the years or has caused the union to receive less than that for which it bargained, there is no inequity that would justify a court's imposition of liability." *Id. citing Mass. Carpenters Cent. Collection Agency*, 343 F.3d 18, 22 (1st Cir. 2003).

Similarly in *McCarthy*, the Court held that there was no evidence that the non-union company was formed due to an "intent to evade" preexisting contractual benefit obligations. *Cement Mason's Pension Trust-Fund, Detroit & Vicinity v. McCarthy*, 2006 WL 770444 at *5 (E.D. Mich. 2006). Citing *Resilient Floors*, the *McCarthy* Court found application of the alter ego doctrine would be inappropriate. *Id.* Notably, the companies in *McCarthy* had different: (1) ownership; (2) business purposes; (3) offices; (4) phone numbers; (5) officers; and (6) management -- and they did different work. *Id.* The two companies also maintained separate bank accounts and insurance policies, and they did not share common equipment. *Id.* Further, there was no evidence of intermingling of funds or assets. *Id.*

This case presents different facts than the above cited cases. Here, IES and TLG represent the inverse of *Resilient Floor and McCarthy*. TLG, a nonunion

company, was incorporated in 1999 after IES signed the CBA. While Defendants argue that there is no evidence that TLG was formed due to an "intent to evade" preexisting contractual benefit obligations, a finding of intent is not essential or prerequisite to imposition of alter ego status. *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 581 (6th Cir. 1986). Instead, it is merely one of the relevant factors which can be considered. *Id.*

"[A] determination of alter ego status is a question of fact . . . ," *id.*, and in this case Plaintiff has put forth sufficient evidence to demonstrate that there is a genuine issue of material fact for the jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). A review of the aforementioned alter ego factors demonstrates summary judgment should not be granted.

The ownership factor favors Defendants. The ownership interests of IES and TLG do not overlap. Rito Llamas owns IES and Julie Llamas owns TLG. In addition, Defendants offer evidence showing that the two companies do not have substantially identical business purposes, customers, equipment, or supervision. Defendant IES focuses on painting and demolition projects; TLG focuses on general contracting, design, building, concrete work, masonry work and some painting. This information suggests that even though there is some overlap, the companies have different businesses, purposes, and customers.

The operations factor, on the other hand, appears to weigh in Plaintiff's favor for four reasons: (1) Rito appears on the payroll of TLG and Julie appears on the payroll of IES; (2) the two companies allegedly

commingle funds; share employees; and operate out of the same facility. As to the commingled funds issue, Rito and Julie Llamas both testified: that both parties maintain the IES check register; Julie Llamas has permission to withdraw cash from an IES account and has permission to write IES checks; Rito Llamas sometimes writes and signs checks for TLG; IES advances funds to TLG and TLG advances to IES; Julie Llamas is listed as an authorized signatory for the IES bank account and Rito Llamas is listed as an authorized signatory for the TLG bank account. *See* Pl. Ex. K; L; M; N.

Furthermore, the companies informally lend significant amounts of money to each other, without keeping close track of the loans in writing. *See* Pl. Ex. N. The two companies do, however, have separate books and separate bank accounts. While this separation might tend to negate the conclusion that the companies commingled funds, a reasonable jury could find that the operations factor weighs in Plaintiff's favor.

The management factor favors Defendants. Rito manages IES and Julie manages TLG.

Finally, Defendants extensively argue that any claims of alter ego status are precluded by the 2003 settlement agreement with the Union, which discharged the Unions unfair labor practices charge. Defendants claim Plaintiff, a third-party beneficiary of the CBA, cannot bring claims that the Union is not entitled to bring. Even though the arguments raised by Defendant are not dispositive to the alter ego issue, the Court notes that Plaintiff is a separate entity from the Union. Plaintiff has separate rights to ensure the

payment of contributions. Although Plaintiff's consent is needed for the settlement agreement to be binding, this does not make Plaintiff a party to the settlement. *See Bakery & Confectionary Union v. United Banking Co.*, 495 F.Supp. 170, 172 (W.D.Penn. 1980)(stating that "[s]ettlement agreements could not bind the trust fund without their consent, they are proper parties to bring this suit and there is nothing in the settlement agreement which makes it binding upon the funds . . .."). Therefore, Plaintiff is not bound by any agreement signed by the Union and Defendants.

Viewing the facts and drawing all inferences in a light most favorable to Plaintiff the Court concludes that genuine issues of material fact exist. Thus, the Court **DENIES** Defendants' IES and TLG's motion for partial summary judgment as to this issue.

In addition, given the controverted facts, the Court **DENIES** Plaintiff's request for a Rule 56(d) finding of material facts related to the alter ego status.

B. Summary Judgment Is Appropriate on the Issue of Whether IES Terminated the CBA Effective May 31, 2004.

Defendants request the Court to find that the CBA terminated effective May 31, 2004. Plaintiff argues that the CBA was not terminated in accordance with contract provisions.

Article XXIII of the CBA provides:

> Section 1. The terms of this Agreement shall be from June 1, 1998 through May 31, 2003 and from year to year thereafter unless either party

> desires a change, in which case it is to notify the opposite party in writing at least sixty (60) days prior to May 31, 2003 or sixty (60) days prior to the anniversay date of the extension thereof.

IES and the Union agreed to a one year extension. Accordingly, IES was required to send written notice of termination to the Union on or before April 1, 2004. On March 23, 2004, IES sent such notification. The letter stated "This will serve as Interior Exterior Specialists' 60 day notice that we will not be renewing our contract with the Painters' Union. We submit this notice in accordance with the contract in a timely manner . . .." Def. Ex. E.

On September 16, 2004, IES submitted June and July 2004 fringe benefit payments to the Union. In a letter accompanying the payments, IES stated:

> Please be advised the June and July 2004 payroll benefits are being submitted in accordance (sic) to our [settlement] Agreement dated May 21, 2004. These payments in no way reflect a desire to continue a contract or to extend the contract as per our letter dated March 23, 2004 and received by your office on March 24, 2004.

IES argues that its March 24, 2004 letter terminated the CBA. IES also claims that the June and July 2004 payments were made under protest and in response to coercion from the Union. Further, IES contends that it entered a construction industry "me too" agreement under Section 8(f) of the National Labor Relations Act ("NLRA"), thereby requiring no more than a notice of intent not to renew by the terms of the agreement.

The Trustee contends IES's conduct subsequent to sending the March letter undermines any claim that the CBA was properly terminated. In addition to submitting the June and July 2004 payments, Plaintiff alleges IES also continued to benefit from additional optional insurance coverage and Plaintiff's payment of the fringe benefits to the employees. According to Plaintiff, these benefits are only available when the CBA is in force. The Trustee also contends that IES withheld vacation pay from its employees from August through November 2004, but then failed to remit the funds to the Trustee. Based on this, Plaintiff argues that IES acted and conducted itself as if the CBA remained in force after May 31, 2004. Plaintiff cited no authority for this position.

IES directs the Court's attention to the requirements for terminating an § 8(f) construction industry agreement in contrast to a standard § 9(a) collective bargaining agreement under the NLRA.[1] IES

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[1] Third-Party Defendant Painters Union in its responses to IES's written discovery requests stated that the following was required to properly terminate a collective bargaining agreement with Local 22:

> To properly terminate a collective bargaining agreement with Painters District Council 22 a contractor must timely notify the union, the Michigan Employment Relations Commission and the Federal Mediation and Conciliation Service. The contract must also comply with the procedures set forth in the Interrogatory 7. If not, the new agreement negotiated by and between the union and the multi-employer association will have full application.

Def. Ex. Q. Painters Union response to Interrogatory 7 states:

> To withdraw from such a bargaining [multi-employer

asserts that as a construction employer it entered an 8(f) "me too" agreement with the Union.[2] In contrast to multi-employer union collective-bargaining relationships governed by section 9 of the Act, construction employers who have an 8(f) relationship with a union, do not have an obligation to bargain for a successor contract. As such, IES contends that its' notice to the Union of an intent not to renew the contract was all that was required by the terms of the agreement and the NLRA.

Even if section 8(f) does not require IES to bargain for a successor contract, the dispositive questions here are: 1) whether proper notice of termination was given; and 2) whether an employer's intent to be bound by the provisions of a CBA may be inferred from the employer's conduct alone, despite its written notice of termination.

> bargaining arrangement], a contract must provide clear and unequivocal written notice of its desire to withdraw from multi-employer bargaining to both the union and the multi-employer association prior to contractually established date for modification of the collective bargaining agreement.

Def. Ex. Q.

[2] "Section 9(a) of the NLRA requires that a union be selected by a majority of the employees in a bargaining unit before the union has the right to represent the employees in collective bargaining. 29 U.S.C. § 159(a). Section 8(f), however, provides an exception for the building and construction industries. In these industries, an employer can enter into a 8(f) collective bargaining agreement with a union that is not supported by a majority of the unit employees. 29 U.S.C. § 158(f)." *Hovey Elec. Inc. v. NLRB*, 22 Fed.Appx. 509, 510 (6th Cir. 2001).

Under the Labor Management Relations Act, enforcement and interpretation of collective bargaining agreements is governed by traditional rules of contract interpretation so long as their application does not conflict with federal labor policy. *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1293 (6th Cir. 1991). When interpreting a collective bargaining agreement, the Court looks at the specific language in the context of the entire agreement. *Id.*; *see also Cincinnati Typographical Union No. 3, Local 14519 v. Gannett Satellite Info. Network*, 17 F.3d 906, 909 (6th Cir. 1994). Further, it is well settled law that contractual obligations will not, in the ordinary course, survive beyond the expiration of a collective bargaining agreement. *Litton Fin. Printing Division v. National Labor Relations Board*, 501 U.S. 190, 207 (1991).

In determining whether proper termination notice was given, it has been held that, where a union and an employer were both signatories to an agreement where the termination clause specified that the agreement would remain in force until either the union or employer gave notice of an intent to terminate, the employer's sixty-day written notice of an intent to terminate was effective to terminate the employer's obligations under the agreement. *See Int'l Union, United Automobile, Aircraft & Agricultural Implement Workers of Am., UAW, AFL CIO, et al v. Textron, Inc.*, et al, 359 F.2d 966 (6th Cir. 1966)(interpreting the termination provisions of a collective bargaining agreement and pension plan entered between the parties and holding that the company intended to terminate, and thought it did by submitting a sixty-day written notice).

Similarly, IES submitted written notice to terminate within the sixty-day time period prescribed by the CBA. The Court finds this notice sufficient. The Trustee, however, argues that IES's post March 23 conduct negates a finding that the agreement terminated.

The Sixth Circuit recognized "the existence of a labor contract 'does not depend on its reduction in writing; it can be shown by conduct manifesting an intention to abide by agreed-upon terms.'" *Int'l Bhd. of Boiler makers, Local 1603 v. Transue & Williams Corp.*, 879 F.2d 138, 1392 (6th Cir. 1989). Thus, the parties to an expired collective bargaining agreement may demonstrate an intent to continue the contract, in whole or in part, while in negotiations for a new contract. *Luden's Inc. v. Local Union No.6 of the Bakery, Confectionary, & Tobacco Workers Int'l Union*, 28 F.3d 347, 354-55 (3d Cir. 1994).

This record is unclear as to whether IES and the Union were actually negotiating a new CBA. The Union submitted the Affidavit of Robert Kennedy, trustee of Painters Union Deposit Fund, attesting that he had several telephone conversations with Rito Llamas before and after he sent his March 23, 2004 termination letter. Mr. Kennedy attests that Rito Llamas told him several times, both before and after he sent the letter, that IES would be signing a new collective bargaining agreement with the Union. For purposes of this Motion, the Court must consider the Trustee's argument that IES extended the collective bargaining agreement both by continuing to make the contributions (June and July 2004 payments) that were required by the agreement and submitting reports to the contributions fund.

In a similar case, *Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662 (7th Cir. 2003), the Seventh Circuit held that an employer's subsequent contributions to pension funds after termination of the collective bargaining agreement, while the parties were attempting to negotiate a new one, did not constitute a continuation of the collective bargaining agreement. *Id.* at. 668-69. Just like *Corman*, IES continued to make contributions after the collective bargaining agreement expired. This is evidence, Plaintiff argues, that IES considered the agreement to still be in effect, despite its formal expiration. When presented with these same arguments, the *Corman* Court stated "it is weak evidence, however - evidence the district judge was not required to credit - because Corman had made clear its unwillingness to continue its relationship with the union, and the funds were the offspring of that relationship." *Id.* at 668.

Likewise, IES made clear in its letter accompanying its June and July 2004 benefit payments that "these payments in no way reflect a desire to continue a contract or to extend the contract . . .." Further, IES contends that the contributions were paid under protest because Tommy Thomas of the Union threatened to take employees off a job if IES did not provided a check for the contributions. Def. Ex. F. It follows that the continued contributions may not even have been voluntary, and if they were involuntary they certainly were not an acknowledgment of a contractual obligation. Therefore, the Court finds that IES intended to terminate, and did terminate the CBA in accordance with the terms of the agreement.

Contrary to IES's suggestion, a finding that the contract terminated on May 31, 2004 does not mean that "the only remaining issue with respect to the fringe benefit audit will be how much of the overpayment to the Fund has to be returned to IES." The Trustee still has a claim for fringe benefits through May 31, 2004. There are genuine issues of material fact as to how much may be owed to Plaintiff. Plaintiff argues that IES deducted vacation benefits but failed to pay these to the Trustee or the employees. In support of this, Plaintiff submits pay check stubs from two former employees. Pl. Ex. I.

IES asserts that no deductions were taken from these checks. In fact, IES contend the entries on the pay stubs were merely accounting errors because every check stub that seemingly indicates a deduction for vacation benefits also contains a corresponding credit for this benefit. Thus, IES contends there is no outstanding delinquency and in fact, they overpaid Plaintiffs.

On the other hand, Plaintiff submits a comprehensive audit and an affidavit which state that the IES would owe $186,781.62 after termination of the CBA. Pl. Ex. B; J. Given this, it is inappropriate for the Court to grant summary judgment on the amounts owing.

V. CONCLUSION

The Court **DENIES** in part and **GRANTS** in part, Defendants Motion for Partial Summary Judgment. The only finding made as a matter of law is that the CBA terminated May 31, 2004. Trial will go forward on Plaintiff's alter ego claim and the amount owed.

IT IS ORDERED.

S/Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: March 27, 2007

The undersigned certifies that a copy of this document was served on the attorneys of record by electronic means or U.S. Mail on March 27, 2007.

S/Linda Vertriest
Deputy Clerk

APPENDIX F

STATUTES

29 U.S.C. § 158. Unfair labor practices

* * *

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such

employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

* * *

29 U.S.C. § 173. Functions of Service

* * *

(d) Use of conciliation and mediation services as last resort

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

* * *

29 U.S.C. § 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have

jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

No. 10-48

IN THE

Supreme Court of the United States

INTERIOR/EXTERIOR SPECIALIST COMPANY,
a Michigan Corporation, d/b/a Interior/Exterior Specialists;
THE LLAMAS GROUP CORPORATION,
a Michigan corporation, and RITO JULIAN LLAMAS,
individually, jointly and severally,

Petitioners,

v.

TRUSTEES OF THE PAINTERS UNION
DEPOSIT FUND, a voluntary unincorporated trust,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. WHETHER THE PETITIONERS HAVE PRESENTED COMPELLING REASONS TO GRANT THE PETITION, WHEN THE LOWER COURTS' ANALYSIS OF THE EVIDENCE AND ALTER EGO LAW DOES NOT CONFLICT WITH A DECISION OF THIS COURT OR A COURT OF APPEALS NOR DOES IT IMPLICATE AN IMPORTANT FEDERAL QUESTION THAT THIS COURT HAS NOT SETTLED?

2. WHETHER PETITONERS HAVE PRESENTED COMPELLING REASONS THE COURT SHOULD GRANT THE PETITION RESPECTING THE ALLEGED VIOLATION OF THE SETTLEMENT AGREEMENT ENTERED INTO BY THE PAINTERS UNION DEPOSIT FUND ("PUDF") IN THE NLRB CONCERNING ALTER EGO ALLEGATIONS WHEN THE PUDF ONLY AGREED TO DISMISS ITS THEN PENDING COMPLAINT WITHOUT PREJUDICE THEREBY RESERVING ITS RIGHT TO RE-FILE THE CASE AT A LATER DATE?

3. WHETHER THE ALTER EGO DOCTRINE PROHIBITS A FINDING THAT NON UNION THE LLAMAS GROUP CORPORATION ("TLG") IS AN ALTER EGO THAT CAN BE HELD TO ALL PROVISIONS OF UNION INTERIOR/EXTERIOR SPECIALIST COMPANY'S ("IES") COLLECTIVE BARGAINING AGREEMENT IN LIGHT OF OVERWHELMING EVIDENCE THAT NON UNION TLG WAS A DISGUISED CONTINUANCE OF UNION IES?

4. WHETHER THE ALTER EGO DOCTRINE PROHIBITS A FINDING THAT NON UNION TLG WAS AN ALTER EGO OF UNION IES WHEN THE TWO ENTITIES HAVE SUBSTANTIALLY IDENTICAL MANAGEMENT, BUSINESS PURPOSES, OPERATIONS, EQUIPMENT, CUSTOMERS, SUPERVISION AND OWNERSHIP?

5. WHETHER THE ALTER EGO DOCTRINE PROHIBITS A FINDING THAT NON UNION TLG IS AN ALTER EGO OF UNION IES IN LIGHT OF PROOF OF ACTUAL EVASION OF LABOR OBLIGATIONS AND OF A DISGUISE INTENDED TO EVADE LABOR OBLIGATIONS?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The caption to the case contains the names of all parties in the case.

Respondent Trustees of the Painters Union Deposit Fund state that they are a voluntary unincorporated trust. As such, it has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The decision of the Sixth Circuit neither conflicts with a decision of this Court or any Court of Appeals nor does it implicate a federal question that this Court has not decided. The Trustees of the Painters Union Deposit Fund (the "PUDF") sought damages against the defendants for breach of their collective bargaining agreement. The Sixth Circuit found that the District Court's extensive factual findings of alter ego were not clearly erroneous and also found that the defendants had breached their obligations to pay certain fringe benefits to the Fund. The fact intensive nature of this case, the fact intensive nature of the alter ego doctrine, the equitable judgments made by the Courts of Appeals and District Courts in applying the alter ego doctrine, and the uniform application of the alter ego standards by the various Circuit Courts, all mandate that this case is not appropriate for Supreme Court review.

The District Court issued its ruling in a detailed, thoughtful, well-reasoned and legally supported opinion. Review of the record reveals that Petitioners' arguments consist of brazen misrepresentations of both lower courts' findings and legal conclusions and disagreements with the District Court's factual findings. Accordingly, this Court should deny the Petition.

STATEMENT OF THE CASE AND GOVERNING FACTS

A. The Parties

IES is a Michigan corporation owned by Mr. Llamas and TLG is a Michigan corporation owned by Mrs. Llamas. IES was signatory to a collective bargaining agreement ("c.b.a.") with the Union. The c.b.a. covers the period from October 5, 1998 through May 31, 2004, (RE. 98, Opinion and Order, pp. 3-4; App 26a.). Respondent, PUDF is a third-party beneficiary of the c.b.a.

B. The Purpose and Function of the PUDF

The PUDF is a "collection fund" which exists "for the purpose of centralizing the payments required of Employers" for health insurance, pension, vacation, apprentice training and related programs for employees employed under the agreement (and similar agreements with other contributing employers). (RE. 84-2 PUDF Brief in Support of Motion for Summary Judgment as to Liability against IES and Llamas, Ex. A. c.b.a., p. 8) Article XVIII, Section 1. PUDF is responsible for collecting fringe benefit contributions from contributing employers, including IES/TLG, and for allocating those contributions between the relevant funds. The c.b.a. specifies the wages and fringe benefit contributions that are to be paid for each hour worked by covered employees. *See id*, Article III.

PUDF enforces the obligations of contributing employers to report covered work hours and to collect

from contributing employers the required fringe benefit contributions for hours worked by covered employees. The c.b.a provides for a PUDF auditor "to have access to, and to inspect any and all books, records, accounts, ledgers and records of original entry, for the purpose of determining whether or not the Employer has conformed with the provisions of this Agreement", known as a "comprehensive audit." *See id.*, Article XVIII, Section 2.

C. IES's Initial Refusal in 2003 to Allow A Comprehensive Audit

The action below arose from the results of a comprehensive audit of IES and TLG, PUDF ultimately performed in 2005. PUDF initially attempted to review IES's books and records through its own express order of September 23, 2003, (RE. 87, Plaintiffs' Brief in Response to Defendants' Motion for Partial Summary Judgment, p. 2). IES's refusal forced PUDF to file a complaint against IES on February 12, 2004 in the District Court (RE. 87-4, February 12, 2004 complaint). Shortly thereafter, IES notified the Union by letter dated March 23, 2004, that it would not be renewing its contract with the Union, (RE. 86-6, IES/TLGs' Motion for Partial Summary Judgment, termination letter, Ex. E.). Based upon this notice, the c.b.a. was set to expire on May 31, 2004, (RE. 84-2, Ex. A, c.b.a., p. 12, Art. XXIII), in the absence of the subsequent negotiation of a new c.b.a. (RE. 158, trial transcript vol. four, pp. 7-13, testimony of Union officer Robert Kennedy).

D. The Settlement Agreement Dated May 21, 2004 Between IES and the Union

IES and the Union entered into a settlement agreement on May 21, 2004 ("Settlement Agreement") pursuant to which the Union agreed to (RE. 87-5, Exhibit D, settlement agreement) withdraw a 2003 N.L.R.B. charge alleging an illegal double-breasted operation between IES and TLG. (RE. 86-11, N.L.R.B. Charge, Exh. J). The Settlement Agreement precluded TLG from serving as a painting contractor and required it to subcontract any painting work it might acquire to either IES or to a contractor having a labor contract with the Union. In return, the Union agreed to withdraw its then-pending unfair labor practice charge and to recommend that PUDF dismiss the then-pending lawsuit "*without prejudice*". (RE. 87-5, exh. D). Union officer Robert Kennedy testified the goal of the Settlement Agreement was to allow IES and the Union to be able to move forward and work together as a union contractor and a union (RE. 158, transcript, vol. four, p. 17).

E. PUDF's Dismissal of the Initial Complaint

In connection with the Settlement Agreement, PUDF dismissed its initial complaint on June 4, 2004 *without* prejudice and *prior* to PUDF conducting an audit. (RE. 87-6, Plaintiffs Brief in Response to Defendants' Motion for Partial Summary Judgment, Exhibit E, Stipulated Dismissal Without Prejudice).

PUDF was *neither a party nor a signatory* to the settlement agreement. By dismissing the claim without

prejudice, PUDF expressly reserved the right to subsequently request and/or file suit to compel the comprehensive audit to the extent such action was deemed necessary. IES, represented by counsel, expressly stipulated to the dismissal ***without prejudice***. *Id.*

F. IES Notifies Union That it was Not Renewing the C.B.A.

In early December of 2004, Mr. Llamas notified Mr. Kennedy that he did not intend to re-sign the c.b.a. (RE. 158, trial transcript, vol. four, pp. 22, 29, 33 and 57, testimony of Robert Kennedy).

G. PUDF Orders a Comprehensive Audit Based Upon IES Employee Complaints of The Failure To Pay Benefits

On December 14, 2004, PUDF received notice that three IES employees, Daniel Chaney, Mark E. Chaney and George Lancaster had filed written grievance reports with the Union, dated December 6, 2004. (RE. 87, PUDF' Brief in Response to Defendants' Motion for Partial Summary Judgment, p. 4 and RE. 87-10, Exh. I) The written grievance reports complained of IES' failure to pay their fringe benefits in November of 2004. Based on these written grievance reports, on December 14, 2004 PUDF again ordered a comprehensive audit on all books and related records of IES for the period of September 1, 2001 to date of completion of the audit, pursuant to Article XVIII, Section Two of the c.b.a.

H. IES and TLG Refuse PUDF's Request For an Audit Leading to the Filing of the Instant Case

IES initially refused to permit the comprehensive audit, leading to the filing of the instant case on January 11, 2005. The complaint expressly requested a comprehensive audit of both IES and TLG. (RE. 1, complaint, p. 7-8). IES continued to refuse the comprehensive audit, causing PUDF to file a motion to compel a comprehensive audit of both IES and TLG (RE. 13, comprehensive audit motion). ***In lieu of the filing of a response, IES and TLG instead both voluntarily agreed to produce their books and records***. (District Court Docket Sheet, APPX. Of Defendants, p. 6, unnumbered minute entry notation, dated June 22, 2005, appearing after RE. 23 and before RE. 24, stating "terminate motions" and referencing RE. 13). PUDF completed the comprehensive audit debit memo on June 16, 2005, (RE. 87-3, Plaintiffs' Brief in Response to Defendants' Motion For Partial Summary Judgment, Ex. B, 6/16/05 debit memo, pp. 7-10). After meeting with Mrs. Llamas, and reviewing her computations of the amount of alter ego liability that would exist if that liability were found, PUDF adjusted and revised the comprehensive audit debit memo (*Id.*, Ex. B, pp. 1-6; RE. 152, trial transcript, vol. one, pp. 35-36, testimony of Jeffrey Ruehle).

I. The Comprehensive Audit Confirmed That IES Was Using TLG to Evade Its C.B.A Fringe Benefit Payment Obligations

PUDF based its audit on IES and TLG's actual books and records and limited its scope only to employees who, according to PUDF records, were painters and whose employment was shared between IES and TLG. (RE. 87-11, exh. J, ¶ three). PUDF determined that the amount of liability from the comprehensive audit through May 31, 2004 was $186,781.62. (*Id*, exh. J, ¶ ten).

The audit revealed that IES and TLG were transferring large amounts of money to one another, with the principals purportedly having no knowledge or understanding of the purpose for such transfers. The audit revealed IES and TLG were so financially and operationally intertwined that IES's use of TLG and its employees deprived the Union from receiving what it bargained for under the c.b.a.

1. *TLG and IES Use The Same Employees Interchangeably*

The comprehensive audit exposed IES and TLG's continual and persistent exchange of the same employees during the audit period at the whim of the Llamases. (RE. 87-11, Plaintiffs' Brief in Response to Defendants' Motion for Partial Summary Judgment, Exh J., affidavit of Jeffrey Ruehle).

It confirmed that most of the TLG employees were also employees of IES (RE. 152, trial transcript, vol. one,

p. 44), many worked for both at the same time, and the same employees bounced back and forth (*id.* at 44-45) at the will of Mr. and Mrs. Llamas. Mrs. Llamas admitted that employees could have gone back and forth in the same month (RE. 154, trial transcript, vol. two, pp. 90, 98), that TLG hired some of the IES employees and that some of the TLG employees also worked for IES (*id.* at 10-11; *see also* 76-79). During the years of 2001 and 2002, the percentage of IES employees also appearing on the TLG payroll exceeded fifty percent! (RE. 152, trial transcript, vol. one, p. 45). The audit also revealed Mrs. Llamas appearing on the IES payroll and Mr. Llamas appearing on the TLG payroll (RE. 87-11, exh. J affidavit of Jeffrey Ruehle, p.5 ¶6; RE. 152, trial transcript, vol. one, p. 54). Significantly, IES paid Mrs. Llamas $50,400.00 in 2001 and $13,600.00 during 2002. Similarly, TLG paid Mr. Llamas $56,000.00 in 2001 (RE. 87-11, exh. J affidavit of Jeffrey Ruehle, p.5, ¶6).

The audit confirmed that painting employees freely floated between TLG and IES depending on which company had work to do (RE. 136 Findings of Fact and Conclusions of Law, ¶¶ 34-36; App. 30a). "The amount of liability from the comprehensive audit through May 31, 2004 only is $186,781.62." (RE: 87-11, exh. J, Affidavit of Jeffrey Ruehle, p. 6, ¶10).

2. TLG and IES were Financially and Operationally Indistinguishable—a true poster child for violation of the alter ego Doctrine

The audit further confirmed that TLG and IES exchanged large sums of money by way of either undocumented loans or subcontract payments (RE. 152, trial transcript, vol. one, p. 55). To obscure these substantial transfers of money, their respective check registers reflected the transfers as an innocuous "accounts payable/trade" (RE. 136, Findings, ¶ 43; App. 31a).

Moreover, the evidence irrefutably established that IES and TLG's business operations were interchangeable. For example, IES and TLG are both located at the same building owned by the Llamases (RE. 152, trial transcript, vol. one, p. 134). TLG used laid off IES employees for painting (*id.*, pp. 134-135). Despite being the owner of TLG and allegedly having no managerial involvement with IES, Mrs. Llamas signed the IES State of Michigan filing for 2003 *as President of IES*, PUDF APP'X p. 665, exh. 37, (RE. 152, trial transcript, vol. one, pp. 136-37). Mr. and Mrs. Llamas together worked on the IES check register, (RE. 152, trial transcript, vol. one, pp. 140-142). Mrs. Llamas could sign IES checks (RE. 152, trial transcript, vol. one, p. 197; RE. 136, Findings, ¶21).

Moreover, Mr. Llamas admitted that one company would loan funds to the other company and "the accountants would take care of it" (RE. 152, pp. 173, 178). There was unbridled commingling of funds between IES and TLG with no accounting for same.

Furthermore, the Llamases handled all loans between TLG and IES by verbal agreement, and there were no promissory notes or other written evidence of indebtedness between TLG and IES (RE. 152, pp. 177-178). IES could not explain why it tendered five checks totaling in excess of $7,000.00 to Mrs. Llamas. (RE. 152, trial transcript, vol. one, pp. 142-148; PUDF APP'X, pp. 626, 628, 633, 634, exh. 11, check copies; RE. 136, Findings, ¶ 27; App. 29a). Similarly, Mrs. Llamas signed several IES checks, in an amount exceeding $28,000, with no knowledge or explanation of the purpose for those checks. (*see* RE. 152, trial transcript, vol. one, pp. 142-150; RE. 136, Findings, ¶ 28; App. 29a). (The total value of IES checks contained in PUDF APP'X exh. 11 with signatures purporting to be that of Mrs. Llamas exceeds $200,000.00). Likewise, IES could not explain a bank charge for $20,000.00 with the notation "to Llamas." (RE. 152, trial transcript, vol. one, pp. 143-144; *see* PUDF APP'X pp. 631-32, exh 11; *see* RE. 136, Findings, ¶ ¶28, 29; App. 29a).

The purported management and equipment rental fees TLG paid to IES further evidence the operational and financial unity of these entities. TLG paid management revenue of $106,254.00 to IES in 2003. (RE. 152, trial transcript, vol. one, pp. 151-154; PUDF APP'X p. 655, exh. 25b, p. 533; PUDF APP'X pp. 650-51, exh. 17, 2002 IES tax return, line ten and accompanying Federal Statement for line ten; RE. 136, Findings, ¶ 44; App. 31a). Mr. Llamas could not explain how he determined the amount of the management fee, did not recall what IES did to earn it, and did not recall anything being in writing for the fee (RE. 152, trial transcript, vol. one, pp. 155-156, 165).

Similarly, IES charged TLG $71,200.00 for equipment rental, even though no equipment was rented! (RE. 154, transcript, vol. two, p. 42), (RE. 152, trial transcript, vol. one, pp. 156-157; R 136, Findings, ¶ 45; App. 31a-32a). (R 152, trial transcript, vol. one, pp. 162, 166). There was nothing in writing to reflect this transaction. (R 152, trial transcript, vol. one, pp. 162, 166). Significantly, the management fee and equipment rental revenue IES received from TLG in 2003 constituted thirty nine percent of IES's total income for the year! (RE. 152, trial transcript, vol. one, pp. 164-165; RE. 136, Findings, ¶ 50; App. 32a).

Further evidence of the lack of any material distinction between IES and TLG is persistent subcontracting of IES work to TLG to avoid its fringe benefit obligations. (RE. 152, trial transcript, vol. one, p. 151; PUDF APP'X p. 652, exh. 25b, pp. 66, 78, 97 and 533; RE. 136, Findings, ¶ 77; App. 40a). There were no agreements evidencing loans, and no written agreements evidencing subcontracting, (RE. 154, transcript, pp. 35-36).

PUDF's expert testified that (RE. 154, pp. 110, 146-47) IES and TLG's accountant treated the entities as one company by moving income and expenses between the two without any recognition that they were separate and distinct entities. (RE. 154, transcript, pp. 123, 142; RE 136, Findings, ¶ 66; App. 35a).

He also opined that IES and TLG were so financially and substantially intertwined that no one could consider them financially separate from one another. (RE. 87-18, PUDF Brief in Response to Defendants' Motion for

Partial Summary Judgment, exh. Q, Scheuer affidavit, p. 5, ¶ 11; RE. 154, transcript, pp. 129-30, 135; Findings, RE. 136, ¶ 68; App. 35a-36a).

REASONS FOR DENYING THE PETITION

I. THE DISTRICT COURT AND THE SIXTH CIRCUIT PROPERLY PERMITTED PUDF TO ENFORCE IES'S FRINGE PAYMENT OBLIGATIONS UNDER THE COLLECTIVE BARGAINING AGREEMENT

A. The Settlement Agreement Expressly Provided for an Already Existing Lawsuit For Fringe Benefits to be Dismissed Without Prejudice, Making it Clear that PUDF could file a Future Lawsuit for Fringe Benefits

IES and TLG erroneously argue that the Sixth Circuit "rendered the NLRB impotent to enter into any meaningful settlement of alter ego claims" by allowing the "third party beneficiary Fund" to ignore the May 21, 2004 Settlement Agreement." *See* Petitioners' Brief at 10. This argument, however, is entirely premised upon a brazen misrepresentation of the terms of the Settlement Agreement.

First, as the Sixth Circuit properly observed, the Settlement Agreement said nothing about precluding PUDF from pursuing its fiduciary obligation to enforce the c.b.a., other than that the Union would recommend to PUDF to dismiss "*without prejudice*" its previously existing lawsuit against IES for fringe benefit contributions. (RE. 87-5, PUDF Response to

Defendants Motion for Partial Summary Judgment, exh. E, ¶ 2). A dismissal "without prejudice" expressly means *without* bar to refiling, *see* Fed. R. Civ. P. 41(a)(2); *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 934-35 (11th Cir. 1987). The courts below expressly recognized that nowhere in the Settlement Agreement did it provide for PUDF to release the alter ego claims it might have.

Therefore, even assuming Petitioners are correct in characterizing PUDF as a "third party beneficiary" to the Settlement Agreement, there are no terms within that agreement that precluded the re-filing of its alter ego complaint. On the contrary, the term "*without prejudice*" expressly contemplated PUDF's right to re-file the complaint. PUDF did not agree to refrain from enforcing its fiduciary obligation to seek fringe benefits due, (nor could it have, because trustees of multiemployer benefit trust funds are under a fiduciary duty to act to ensure that a plan receives all funds to which it is entitled, *see* 29 U. S. C. § 1104; *see also Krohn v. Huron Memorial Hospital*, 173 F.3d 542, 547 (6th Cir. 1999)). The courts below correctly recognized that Petitioner is trying to enforce an agreement it never made!!

B. The Ability of Trust Funds to Sue For Fringe Benefit Obligations Following Union Settlement Agreements Has Been Expressly and Repeatedly Upheld by a Litany of Case Law Dating Back Several Decades.

Without any supporting authority whatsoever, Petitioners argue that because PUDF is a third party beneficiary to the c.b.a., it is necessarily a third party beneficiary of the Settlement Agreement. This flawed contention ignores the well established distinction between a pension fund and the union and is expressly rejected by applicable law.

For example, in *Bakery & Confectionery Union v. United Baking Company*, 495 F. Supp. 170, 172 (W.D. Penn. 1980), the court recognized the distinction between the fund and the union explaining:

> [T]he plaintiffs are the funds themselves, not the union, not the individual members of the union or any parties to the collective bargaining agreement. The funds appear to be separate entities and trusts with separate rights to ensure the payment of contributions to them. ***Settlement agreements could not bind the trust fund without their consent, they are proper parties to bring this suit and there is nothing in the Settlement Agreement which makes it binding upon the funds and, as a matter of fact, it is specifically excluded from affecting their rights.***

> We, therefore, hold that under the circumstances, the funds are not bound by any agreement made by the union.

Id. (emphasis added).

Similarly, in *Southern California Retail Clerks Union et al. v. Bjorklund*, 728 F.2d 1262, 1264-66 (9th Cir. 1984) the defendant argued that a union officer had fraudulently induced him into entering a collective bargaining agreement by misrepresenting his eligibility for a pension under the agreement. The court correctly noted that under traditional contract law, the trust funds, as third party beneficiaries of the collective bargaining agreements, would be subject to any contract defenses generally available against the contracting parties themselves. But the court severely limited the range of contract defenses in this context holding that traditional contract law does not apply in full force in suits brought under the LMRA and ERISA to collect delinquent trust fund contributions. The court premised its ruling on the legislative history behind 29 U.S.C. § 1145 which sought to disallow the conversion of simple collection actions brought by plan trustees into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. *Id.*

Finally, in *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769, 773 (9th Cir. 1986), the Ninth Circuit again addressed the issue of whether contract defenses generally available against the contracting parties themselves were available in the fund/union context. The court held that Congress and the courts

have acted to simplify trust fund collection actions by restricting the availability of contract defenses, which make collection actions unnecessarily cumbersome and costly. *Id.*

C. The Fund is Not an Intended Third Party Beneficiary of the Settlement Agreement

Petitioners reason that because PUDF is a third party beneficiary of the c.b.a., it is also a third party beneficiary of the Settlement Agreement which effectively amends the c.b.a. Petitioners' conclude from this flawed premise that PUDF cannot have greater rights under the c.b.a. than can the Union. Petitioners' base this argument upon flawed logic and disregard both the restriction of third-party beneficiary defenses in ERISA fringe benefit collection actions, *see Rozay's Transfer, Bjorklund* and 29 U.S.C. § 1145 as discussed *supra*, and the fact that the Settlement Agreement did not abrogate or terminate the c.b.a. or PUDF's responsibilities thereunder.

Petitioners attempt to distinguish the facts here from *United Baking Company*, *supra*, by arguing that the latter did not involve pension matters. Examination of this case clearly reflects that it did. The issue centered on whether pension and welfare fund obligations of a c.b.a. survived a union settlement agreement. *Id.* at 171.

Petitioners, here, as they did below, play fast and loose with the facts, again claiming that PUDF"s amended complaint alleged it is an intended third-party beneficiary to the *Settlement Agreement*.

See Petitioner's Brief at 15. This is patently false. The amended complaint clearly states that PUDF is a third party beneficiary **of the c.b.a.**, not of the Settlement Agreement (RE. 29, amended complaint, ¶ 10). Lastly, the dismissal without prejudice of the first lawsuit references an agreement of the parties to settle the issues by dismissing "without prejudice."

D. TLG Acquiesced to the Audit.

Petitioners argue that "there was never a valid reason for seeking the audit or filing suit." Petitioners' Brief at pp.10-11, and that "[e]ven the district court acknowledged that TLG should not have been sued." *Id.* at p. 11 fn. 2.

In reality, PUDF filed suit to compel the audit to include TLG. A comprehensive audit of both entities was necessary to fully investigate the alter ego allegations against TLG. When IES and TLG both initially refused to cooperate, PUDF filed a motion to compel a comprehensive audit of both IES and TLG (RE. 13, comprehensive audit motion). Petitioners fail to reveal to this Court that ***IES and TLG chose not to respond to this motion and instead*** *voluntarily agreed* ***to permit PUDF to conduct the audit.*** The District Court's docket correctly reflects this on its docket sheet as an unnumbered notation dated June 22, 2005, appearing between RE. 23 and before RE. 24, stating "terminate motions," specifically referencing the RE. 13 Motion to Compel filed by PUDF, and stating that the motion was withdrawn per letter from PUDF counsel.

PUDF completed the comprehensive audit against both IES and TLG on June 16, 2005, resulting in a debit memo (RE. 87-3, Plaintiffs' Brief in Response to Defendants' Motion for Partial Summary Judgment, Ex. B debit memo dated June 16, 2005, and revised memo dated January 4, 2006), and a revised debit memo, *id.*, after a meeting between Mr. Ruehle and Mrs. Llamas.

The District Court correctly concluded that TLG acquiesced to the audit and worked through the calculations of the potential amount of alter ego liability with the Fund (PUDF APP'X, exh. 36, pp. 656-664, defendants' written objections to audit debit memo; RE. 136, Findings, ¶ 134; App. 49a).

E. Petitioners Claims Are Not Supported By Legal Authority

Petitioners contend the Union based its request to PUDF to conduct a comprehensive audit on the fact that IES properly terminated its c.b.a. in circumvention of the Settlement Agreement. Petitioners argue that "at least two courts have recognized and rejected union attempts to circumvent settlement agreements in this matter" citing *Cement Mason's Union Local No. 592 Pension Fund v. Zappone*, 501 F. Supp. 2d 714, 722-23 (E.D. Penn. 2007) and *Rhode Island Carpenters Annuity Fund* v. *Trevi Icos Corp.*, 533 F. Supp. 2d 246 (D.R. I., 2008). *See* Petitioners' brief at p. 11. A review of *Zappone* and *Rhode Island Carpenters*, however, actually support the lower courts' decision here.

In *Zappone*, the c.b.a. did not cover the work performed, both because the employees were not union members, and because the project at issue was not within the jurisdiction of the collective bargaining agreement. Thus, no contractual obligation to pay fringe benefits existed in the first place, *id.* at 718-21. Here, a clear and definite obligation to contribute under the c.b.a *does* exist in the present matter. Thus, under *Zappone*, when a contractual obligation to contribute does exist, as it clearly does here, it is enforceable under the authority of 29 U.S.C. § 1145, *Zappone*, 501 F. Supp. 2d at 718.

Likewise, *Rhode Island Carpenters Annuity Fund*, *supra*, is a jurisdictional case where the court found the work involved was not covered by the collective bargaining agreement at issue, *id.* at 249. The instant case, by contrast, involves a c.b.a. expressly covering the work at issue, for which fringe benefit contributions are owing, and where the Union Settlement Agreement does nothing to change the c.b.a. or the benefits owing under it.

Moreover, *Operative Plasterers' & Cement Masons' Local #18 Annuity Fund v. J. P. Phillips, Inc.*, 573 F. Supp. 2d 1059 (C.D. Ill. 2008), is also inapposite. It involved a prior settlement of a union jurisdictional dispute which precluded enforcement of a collective bargaining agreement, *id.* at 1064-65. The Settlement Agreement in this case, by contrast, did nothing to abrogate either the c.b.a., its jurisdiction, or the contractual duties it imposed.

II. THE SIXTH CIRCUIT HAS NOT DECLARED "DOUBLE BREASTING ILLEGAL BUT RATHER HAS FOLLOWED ALTER EGO DOCTRINE ARTICULATED BY THIS COURT WHICH THE OTHER CIRCUITS HAVE ALSO FOLLOWED DATING BACK DECADES

Petitioner agues that the Sixth Circuit here "reached the erroneous conclusion that "double breasted operations" are illegal. *See* Petitioners' brief at p. 16. This is a brazen misrepresentation of the Sixth Circuit's opinion. Petitioners premise this erroneous contention on the following language of the Sixth Circuit's opinion:

> Alter ego liability ***may apply*** to a new, non union entity that is "merely a disguised continuance of the old [union] employer," or to a "double breasted operation consisting of "two or more coexisting employers performing the same work [that] are in fact one business, separated only in form."

See Petitioners' Brief at App. 9a-10a *Citing Trustees of the Detroit Carpenters Fringe Benefit Funds v. Indus Contracting, LLC*, 581 F.3d 313, 317-318 (6th Cir. 2009) (emphasis added). This false contention plays fast and loose with the law and deliberately ignores the Sixth Circuit's language as well as numerous Circuits' recognition of the legal validity of the foregoing statement dating back decades. The plain language of the Sixth Circuit's statement does not condemn ***all*** double breasted operations as Petitioner advocates, but rather plainly states that such liability "***may apply***"

where the courts determine that such operations are in fact a "disguised contrivance of the old employer" or "one business, separated only in form." *Id.*

The foregoing is not a blanket condemnation of "double breasted operations." On the contrary, the Sixth Circuit, as well as other circuits commonly apply the alter ego doctrine in "double breasted" situations where the facts establish a "disguised continuance" of the union entity through "coexisting employers performing the same work [that] are in fact ***one business, separated only in form.***" *NLRB v. Fullerton Transfer & Storage Ltd., Inc.*, 910 F.2d 331, 336 (6th Cir. 1990); *See also Massachusetts Carpenters Central Collection Agency v. Belmont Concrete Corporation and Alger Construction Corporation*, 139 F.3d 304 (1st Cir. 1998); *Thomas Pearson, et al. v. Component Technology*, 247 F.3d 471, 486 (3rd Cir. 2001); *Local 282 v. Sandimo Materials, et al.*, 250 F.3d 120 (2nd Cir. 2001); *UA Local 848 v. Nor-Cal Plumbing, Inc., et al.*, 48 F.3d 1465, 1469-1470 (9th Cir. 1994); *Pipefitters v. Waldo R., Inc., et al*, 872 F.2d 815 (8th Cir. 1989); *Walter N. Yoder & Sons v. NLRB*, 754 F.2d 531 (4th Cir, 1985); *NLRB v. Leonard Hebert*, 696 F.2d 1120 (5th Cir. 1983).

The claim that the Sixth Circuit has declared all "double breasted operations" illegal is completely unfounded.

III. THE SIXTH CIRCUIT'S DECISION IN THIS CASE IS CONSISTENT WITH THE ALTER EGO STANDARD ARTICULATED BY THIS COURT IN *SOUTHPORT PETROLEUM CO. V. NLRB*

A. The Sixth Circuit's Ruling Does Not Condemn All Double Breasted Operations—Only Those That Are Intended To Evade Labor Obligations.

This Court set forth the universally applied alter ego standard in *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942), where, the employer attempted to avoid its obligations to its union employees by making a technical change to its ownership. In determining whether there was an alter ego relationship between the two companies the Court looked to "whether there was a *bona fide* discontinuance and a true change of ownership - or- merely a disguised continuance of the old employer . . ." *Southport Petroleum Co.*, 315 U.S. at 106.

Significantly, the *Southport Petroleum* Court never addressed whether or not it required an intent to evade the union obligations as an element of an alter ego analysis because the intent was obvious from the facts of the case.

Petitioners further rely upon *Howard Johnson Co. v. Detroit Local Joint Executive Board Hotel & Restaurant Employees*, 417 U.S. 249 (1974). This was a successor case. There was a bona fide purchase and sale and an arm's length relinquishment of control between

two independent entities. *Southport Petroleum* was an alter ego case because of the disguised continuance of the original employer. The difference between successor and alter ego lies in the fact that while a successor, "may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of the collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them," where an alter ego is subject to all of the legal and contractual obligations of the predecessor. *Howard Johnson Co.*, 417 U.S. at 261 (citing *Southport Petroleum Co.*, 315 U.S. at 106.).

Petitioners erroneously announce that the federal courts ignore these two decisions, which require that "an improper transaction is a 'disguise intended to evade' labor obligations" and apply doctrine that is wholly inconsistent [with] what a pension fund must establish in order to hold a non union entity to the CBA of a Union signatory." *See* Petitioners' Brief at 22. As discussed below, this claim does not withstand scrutiny.

B. IES and TLG Are Alter Egos Under the *Southport Petroleum* Standard

IES and TLG are clearly alter egos based upon the *Southport Petroleum* standard. As established in the facts, there was a "virtual mountain of evidence" establishing the intermingling of IES and TLGs' finances and operations. *See Trustees of the Detroit Carpenters Fringe Benefit Funds v. Industrial Contracting LLC*, 581 F.3d 313, 317 (6th Cir. 2009). Plain and simple, the creation of non union TLG by the wife of IES's owner was nothing more than a change in

structure of the employing entity that IES used to avoid its collective bargaining obligations. This modification involved change in form only— management or ownership of IES and TLG had substantially identical ownership, management, and operations.

C. Circuit Courts Consistently Apply the *Southport Petroleum* Standard

Petitioners argue that "the Circuits are inconsistent concerning what a pension fund must establish in order to hold a non union entity to the CBA of a union signatory." *See* Petitioners' brief at 22. On the contrary, the Circuits have consistently applied the *Southport Petroleum* standard in alter ego cases. The Circuits have merely developed various factors to review when determining whether or not two companies are alter egos consistent with this standard. Courts base most of these factors upon the "single employer" factors used by the NLRB. Each Circuit uses these factors to determine whether or not there has been a change in corporate form frequently used to avoid the effect of labor laws without any substantial change in ownership or management.

The Sixth Circuit, like other Circuits, looks to the circumstances surrounding a change in corporate form to determine, "whether the change resulted in a 'bona fide discontinuance and a true change of ownership' or was merely 'a disguised continuance of an old employer.'" *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576 (6th Cir. 1986), citing *Southport Petroleum Co., supra*, at 106. To determine this, the Sixth Circuit and others have recognized that factors relevant to finding alter ego

status include "whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership." *Nelson Electric v. NLRB*, 638 F.2d 965, 968 (6th Cir. 1981), citing *Crawford Door Sales Co.*, 226 NLRB 1144 (1976); *Goodman Piping Products Co., Inc., v. NLRB*, 741 F.2d 10, 12 (2nd Cir. 1984); *NLRB v. Campbell-Harris Electric, Inc.*, 719 F.2d 292, 295 (8th Cir. 1983); *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 553-54 (3rd Cir. 1983), *cert denied*, 464 U.S. 1039 (1984); *Amalgamated Meat Cutters & Butcher Workmen v. NLRB*, 663 F.2d 223, 226-27 (D.C. Cir. 1980); *Allcoast Transfer, Inc.*, 780 F.2d at 579. This standard is commonly referred to as the *Crawford Door* standard. Upon analyzing opinions of its sister circuits, the Sixth Circuit concluded that, "a finding of employer intent is not essential or prerequisite to imposition of alter ego status. Instead, it is merely one of the relevant factors which the Board can consider; along with the well established factors . . ."*Allcoast Transfer, Inc.*, 780 F.2d at 581.

The Sixth Circuit recognizes that an alter ego analysis should be flexible and, "under a flexible approach, no one element should become a prerequisite to imposition of alter ego status; rather, all the relevant factors must be considered together." *Allcoast Transfer, Inc.*, 780 F.2d at 582. A finding of intent to evade adds support to an alter ego finding, S*ee Fullerton*, 910 F.2d at 337.

This same flexible approach is taken by the First, Second, Third, Eleventh, and the D.C. Circuits. Each of these apply the *Crawford Door* factors and consider the

intent of the parties in creating the second company as an additional factor. None of these Circuits believe that *Southport Petroleum* required express evidence of wrongful intent as an indispensible prerequisite to the imposition of the alter ego doctrine. *See Massachusetts Carpenters Central Collection Agency, supra*, 139 F.3d 304 (1st Cir. 1998) (applying the alter ego test to parallel companies); *N.L.R.B. v. Hospital San Rafael, Inc.*, 42 F.3d 45, 354 (1st Cir. 1994); *Goodman Piping Products, Inc. v. National Labor Relations Board*, 741 F.2d 10 (2nd Cir. 1984); *Trafford Distribution Center v. National Labor Relations Board; National Labor Relations Board v. Liberty Source W, LLC and its Alter Ego, Trafford Distribution Center*, 478 F.3d 172, 179 (3rd Cir. 2007); *Board of Trustees, Container Mechanics Welfare/ Pension Fund v. Universal Enterprises, Inc.*, 751 F.2d 1177, 1184 (11th Cir. 1985); *Fugazy Continental Corporation v. NLRB*, 725 F.2d 1416, 1419 (D.C. Cir. 1984).

IV. THE LOWER COURTS DID NOT CREATE A MORE LENIENT ANALYSIS OF ALTER EGO LIABILITY AND THE EVIDENCE SUPPORTED ALL OF THE DISTRICT COURT FINDINGS WHICH THE SIXTH CIRCUIT PROPERLY AFFIRMED.

A. The Sixth Circuit Did Not Uphold A Finding Of Alter Ego Liability In The Absence Of Proof Of Substantially Identical Management, Business Purposes, Operations, Equipment, Customers, Supervision And Ownership.

The District Court correctly found TLG to be IES's alter ego. It carefully weighed each finding, and balanced each appropriately. The District Court correctly found the operations factor to weigh heavily in favor of PUDF, based on the extensive testimony and documents referenced in the record. In fact, the District Court specifically noted, amongst additional alter ego facts it noted ("More facts supporting alter ego are present."), that IES and TLG have a "pervasive intermingling of funds" (RE. 136, Findings, ¶ 226). The Sixth Circuit affirmed, finding that the District Court's extensive factual findings were not clearly erroneous and also found that the Petitioners had breached their obligations to pay certain fringe benefits to the Fund.

B. The District Court Made Careful and Explicit Factual Findings of All Factors Relevant to a Finding of Alter Ego

Petitioners argue, without authority, that while they do not dispute a number of the District Court's alter ego factual findings, the District Court erred by reducing the alter ego doctrine's analytical threshold of "substantially identical" to "any similarity." Petitioners' brief at 23-24. Petitioners contend the alter ego doctrine requires each and every alter ego factor to meet the "substantially identical" threshold. This wholly distorts the District Court's opinion. Moreover, this ignores the doctrine's clear corollary which provides, "No one alter ego factor is controlling and all need not be present." *Allcoast*, *supra* at 582. A brief review of the District Court's findings demonstrate that it properly analyzed all of the factors, finding that some militate in favor of the Petitioners and others in favor of PUDF. At the end of its analysis, however, it properly apportioned more weight to the material aspects of Petitioners' business operations which demonstrated a financial and operational unity of those entities.

a. Substantially Identical Operations

The District Court held IES and TLG have a "pervasive intermingling of funds," shared staff during a significant period of time to a substantial degree (RE. 136, Findings, ¶¶ 226-227; App. 65a-66a), and noted *overwhelming* operations factors supporting alter ego (RE. 136, Findings, ¶¶ 18-68; App. 27a-36a). In the District Court's judgment, therefore, the material aspects of IES and TLG's operations, such as the lack

of any financial distinction and employee intermingling substantially outweighed the differences Petitioners relied upon to establish operational dissimilarity such as different copiers, computers, telephones and field equipment. *See* Petitioners' Brief at 2. The Court correctly found the operations factor to weigh heavily in favor of PUDF (RE. 136, Findings, ¶ 222; App. 64a).

b. Customers

The District Court correctly found that even after disregarding work TLG subcontracted to IES, IES and TLG have some of the same customers (RE. 136 Findings, ¶¶ 72-76; App. 36a-40a), and that the customers factor weighs slightly in favor of PUDF (RE. 136, ¶ 221; App. 64a).

c. Supervision

The District Court correctly found that Mr. Llamas of IES occasionally supervised TLG projects, and found that the supervision factor weights slightly in favor of PUDF (RE. 136, ¶ 219; App. 63a). The District Court found these facts weighed slightly in favor of PUDF (RE. 136, Findings, ¶¶ 69-71, 219; App. 36a, 63a).

d. Intent to Evade

The District Court found that painting employees freely floated between TLG and IES, that TLG is a non-union company, the Steven Chaney complaint and charge, and that the damages of PUDF total $186,781.62. (RE. 136, Findings, ¶¶ 9, 34, 78-79, 295; App. 27a, 30a, 40a, 84a). IES painting employees, when

they worked for TLG, had no fringe benefits reported or paid for them. The IES/TLG enterprise, by doing so, expressly and intentionally evaded the contractual obligation of the c.b.a. to report and pay fringe benefits.

The District Court also found IES subcontracting to TLG (RE. 136, Findings, ¶ 77; App. 40a). This subcontracting moved IES work to TLG, avoided the contractual obligation to report and pay fringe benefits, is evidence of intent to evade, and violated the c.b.a. prohibition on subcontracting (RE. 84-2, ex. A, c.b.a., p. 5, article XI, section one).

The express findings of the District Court clearly reflect the intent to evade established at trial. *NLRB v. Crossroads Elec., Inc.*, no. 05-1395, 178 Fed. Appx. 528, 534 (6th Cir. May 5, 2006) (unpublished) (citing *Allcoast*, 780 F.2d at 581); *Fullerton*, 910 F.2d at 337); Findings, RE. 136, ¶ 212; App 62a).

e. Ownership.

In weighing the ownership factor, the Court noted that ownership by members of the same family may be considered in establishing common ownership, *see Pipe Fitters Union Local No. 392 v. Aggressive Piping, Corp.*, 841 F. Supp. 224, 229 (S. D. Ohio, 1991) and determined that the ownership factor of alter ego weighed only slightly in favor of IES and TLG. (RE. 136, Findings, ¶¶ 1-6, 215-216; App. 26a, 62a-63a).

f. Management.

The Court held that while the management was technically different, the managerial distinctions were not as firm as would usually be the case between two distinct companies, and found this factor to weigh only slightly in favor of IES and TLG (RE. 136, Findings, ¶ 217; App. 63a).

g. Business Purpose.

The District Court held that although the business purposes were generally separate, they overlapped in the form of painting prior to the settlement with the Union, and that this factor weighed only slightly in favor of IES and TLG (RE. 136, Findings, ¶ ¶ 7-10, 218; App. 26a-27a, 63a).

h. Equipment.

The Court found IES and TLG have separate field and office equipment (RE. 136, Findings, ¶ 220; App. 63a). It also noted a large equipment rental fee paid by TLG to IES (RE. 136, Findings, ¶ 45; App. 31a-32a). Additionally, a ladder marked as "I.E.S.-lamas" (sic) was photographed and admitted into evidence (PUDF APP'X, p. 666, exh. 505). Despite the findings of separate field and office equipment, the TLG general ledger showed a large ($71,200.00) and unexplainable payment to IES for rental of IES equipment (RE. 136, ¶ 45; App. 31a-32a). Both of the Petitioners had no idea of the purpose of the equipment rental fee. (RE 154, p. 42; RE 152, p. 158).

C. Petitioners' Arguments Seek to so Restrict Alter Ego Law Such That All Labor Agreements Could Be Avoided With Ease

Under Petitioners' argument, an alter ego finding could only be made if two entities were substantially identical in all of the relevant categories. Such a requirement would reduce alter ego to a strict, extremely inflexible test that would allow two otherwise completely identical identities to avoid their legitimate labor obligations by merely transferring ownership for little or no consideration. Such a result would allow legitimate labor obligations to be avoided with reckless abandon, giving employees zero confidence their pension and other agreed-to fringe benefits would in fact be there for them.

D. Petitioners' Arguments Ignore the Overwhelming Evidence of Their Pervasive Intermingling of Funds and the Operations Factor

Although Petitioners concede that the District Court did note some similarities in operations, they attempted to focus this Sixth Circuit's attention on "facts" which they did not establish at trial. As one example, Petitioners incorrectly claimed that TLG paid its portion of the rent. To the contrary, TLG's purported "rental payment," was allegedly the management fee it paid to IES. However, this "fee" was nothing like "rent." It was arbitrary because it had no consistency from month to month or year to year.

Further, Petitioners, without an expert witness, sought to rebut the damaging testimony of PUDF's

expert Robert Scheuer by arguing "facts" on appeal relating to his background and qualification which were belied by the record (Scheuer obtained a degree in finance and did not work as a shoe salesman) (RE 154, pp. 108, 131-32). Moreover, Petitioners audaciously argued to the Sixth Circuit that because their records were so ridiculously incomplete, inaccurate and unreliable that the court should have ignored Scheuer's opinions because he based them upon such unreliable information. (RE. 87-18, PUDF Brief, Scheuer affidavit, exh. Q, ¶¶ 8 and 9). This is reflective of many of Petitioner's arguments—contentions which transcended the outrageous and audacious.

V. THE SIXTH CIRCUIT'S DECISION IS CONSISTENT WITH THE PURPOSE OF PREVENTING EVASION OF LABOR OBLIGATIONS

A. The Sixth Circuit's Holding In *Resilient Floor* Was Inapplicable To The Facts Of This Case Because Resilient Floor Only Applies Where A Union Company Is Formed After A Non-Union Company That Had No Preexisting Obligations Under A Collective Bargaining Agreement

Petitioners argue that different panels of the Sixth Circuit have issued conflicting opinions respecting whether a court may find alter ego liability without proof of an intent to evade federal labor law obligations. Petitioners cite *Trs. of the Resilient Floor Decorators Ins. Fund. v. A & M Installations, Inc.*, 395 F.3d 244, 248 (6th Cir. 2005) where the Sixth Circuit held facts could not support a finding of alter ego liability if there was not "an intent to evade" because it was "clearly the focus of the alter ego doctrine" and *Allcoast, supra,*

where the court held that "No factor is controlling and all need not be present." *Id.* at 579. From this premise Petitioners' make a gigantic leap in logic to erroneously conclude that "in the Sixth Circuit, two employers can be found alter egos even if no labor obligations were ever evaded." *See* Petitioners' brief at 31.

This contention is absurd.[1] Review of Sixth Circuit precedent reveals that the sole purpose of determining alter ego status is to determine if union signatories used alter ego entities to avoid labor obligations. In the Sixth Circuit, the alter ego doctrine is an equitable doctrine "developed to prevent employers from evading obligations under the [National Labor Relations] Act merely by changing or altering their corporate form." *Allcoast Transfer*, 780 F.2d at 579. The doctrine operates to bind an employer to a collective bargaining agreement if it is found to be an alter ego of a signatory employer. *See id.* at 582-83. The Sixth Circuit adopted its test from National Labor Relations Board case law. Under this doctrine courts examine " 'whether the two enterprises have substantially identical management, business, purpose, operation, equipment, customers,

1. This is particularly true when this Court considers that the lawyers representing the Petitioners' here, recently lost the similar case of *Trustees of Detroit Carpenters Fringe Benefit Funds v. Industrial Contracting, LLC*, 581 F. 3d 313 (6th Cir. 2009) cert denied sub nom. *LaSalle Group, Inc. v. Trustees of Detroit Carpenters Fringe Ben. Funds*, 130 S. Ct. 3323 (2010) where they likewise sought this court's review. This court rejected their Petition. *Id.* The Petitioners' lawyers also represented *LaSalle Group Inc.* in its Petition to this court for review of that case. This is the Petitioners' lawyers' third bite at the apple for this court to review these same issues.

supervision and ownership." An employer's intent to evade the obligations of a collective bargaining contract is merely one of the factors to be considered and is not a prerequisite to the imposition of alter-ego status. *Fullerton Transfer*, 910 F.2d at 337. The Sixth circuit deliberately developed a flexible test reasoning that "an employer who desired to avoid union obligations might be tempted to circumvent the doctrine by altering the corporation's structure based on some legitimate business reason, retaining essentially the same business, and utilizing the change to escape the unwanted obligations." *See Industrial Contracting*, *supra*, at 318 *citing Allcoast Transfer*, 780 F.2d at 582.

Moreover, the Petitioners' (and their lawyers') mantra that the District Court and the Sixth Circuit's rulings here violated the holding in *Resilient Floor* is wrong.

The District Court noted in one of its summary judgment opinions that the fact pattern here represents the inverse of *Resilient Floor*, because the Llamases incorporated TLG, a nonunion company in 1999 *after* IES signed the c.b.a. (RE. 98, Opinion and Order, p. 9). The District Court concluded that where a party forms a non-union company *after* a union company that had preexisting obligations under a collective bargaining agreement, *Resilient Floor*'s harsh intent holding is inapplicable. The court explained the *Resilient Floor* holding as follows:

> It appears *Resilient* did not so much make the intent factor more dispositive when a union company follows a non-union company,

> so much as find the entire application of the alter ego doctrine not appropriate, when a union company follows a non-union company and there is no preexisting labor obligation. The reasoning appears grounded in a concern about whether there is a labor agreement in place when the second company is created, as a negotiating party aware of a double-breasted operation is on notice and can bargain for the prohibition of subcontracting.

RE. 136 Findings ¶¶ 208-209, App. 60a-61a; *Trustees of Painters Union Deposit Fund v. Interior/Exterior Specialist, Co.*, 2008 WL 724355 (E.D. Mich., 2008.) p. 14. (citations omitted)

The Sixth Circuit recently affirmed and validated the foregoing factual distinction the District Court recognized clarifying its ruling in *Resilient Floor* concluding:

> An example of reverse double-breasting was involved in *Trustees of the Resilient Floor Decorators Insurance Fund v. A & M Installations, Inc.*, 395 F.3d 244 (6th Cir. 2005). In that case, a former employee of a non-union carpet sales company started a carpet installation company that hired union labor. The companies shared office and warehouse space and secretarial staff, and the president of the installation company was the former brother-in-law of the president of the sales company. *See id.* at 246-47. We found that the two companies were not alter egos,

> however, on alternative bases: (1) because the non-union carpet sales company had no preexisting labor obligations to evade, (2) because there was no "pervasive intermingling of funds and operations" as found in other alter ego cases, and (3) because the installation company's workers were, in fact, independent contractors and not "employees" under ERISA. *See id.* at 248-49, 251.
>
> * * *
>
> **To the extent that *Resilient Floor* can be seen to conflict with the holding in *Allcoast Transfer* and *Fullerton Transfer*, we suggest that it should be confined to its facts. (emphasis added).**

Industrial Contracting, LLC, supra, at 318-319. (citations included).

Stated otherwise, unlike "the non-union carpet sales company" in *A&M Installations*, TLG had preexisting labor obligations it could avoid—those of IES.

B. Whether Or Not An Express Finding of Intent to Evade Need Be Part of the Alter Ego Analysis is Not at Issue Here Because the District Court Found Significant and Material Evidence of an Intent to Evade

Petitioners' make the blatant misstatement that "the district court never concluded that IES and TLG intended to evade CBA obligations. . ." *See* Petitioners' brief at 31. The District Court concluded unequivocally that: "Although IES and TLG do not share equipment, ***unlike Resilient, there is evidence of intent to evade.***" RE. 136, Findings ¶227, App. 66a; *Trustees of Painters Union Deposit Fund v. Interior/Exterior Specialist, Co.*, 2008 WL 724355 (E.D. Mich, 2008) at 17 (emphasis added). Moreover, the District Court made multiple explicit factual findings of intent to evade (RE. 136, Findings, ¶¶ 77-79; App. 40a). The District Court's findings that employees freely and substantially floated between IES and TLG, *id.* at ¶34, App. 30a, is also strong evidence of intent to evade, because the fringe benefit liability accrued as painters worked for TLG without payment of their fringe benefits.

CONCLUSION

All of the Circuit Courts apply the *Southport Petroleum* standard. Each Circuit Court reviews various factors to determine whether an employer attempted to avoid its labor obligations by making a technical change to its ownership. The Courts then determine whether there is a disguised continuance of the older employer or a bona fide change in ownership. Each Circuit Court looks at the facts surrounding the creation of a new company or second company to determine whether it was created or used to evade labor obligations. All of the Circuit Courts will find an alter ego if a review of the facts show that there was not a significant change in ownership or management and one of the companies is being used to avoid the labor obligations of the other company. It does not matter whether the intent to evade the labor obligation was express or could be inferred from the facts of the case. When direct or circumstantial evidence differs, the Courts emphasize different evidence, but where the factors are met, alter ego status is found. The Sixth Circuit's decision should be upheld and this Court should deny Petitioners' Petition for Certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

INTERIOR/EXTERIOR SPECIALIST COMPANY, THE LLAMAS GROUP CORPORATION, AND RITO JULIAN LLAMAS,
Petitioners,

v.

TRUSTEES OF THE PAINTERS UNION DEPOSIT FUND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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REPLY

The Fund never responded to the major concern set forth in the Petition – that the NLRB is rendered powerless if pension funds can ignore the terms of an NLRB settlement that resolves an unfair labor practice claim and amends the same CBA that the funds rely upon to collect fringe benefits. The Fund's lack of a response is telling: even the Fund must agree that the NLRB's impotence in settling labor disputes that affect fringe benefits is a significant concern. For this reason, this Court should grant the Petition.

I. Because the Settlement Agreement amended the CBA, the Fund was barred from suing IES and TLG.

The Painters Union filed a claim against union IES and nonunion TLG in the NLRB asserting alter ego. The resulting Settlement Agreement, sanctioned by the NLRB, amended IES's CBA by making nonunion TLG responsible for fringe benefits on painting work. Subsequently, the Respondent Fund sued IES and TLG for alter ego, breach of the CBA, and breach of the Settlement Agreement. The Fund alleged in its pleadings that "because of the settlement agreement ... TLG is bound by the provisions of the [CBA]." RE.29: ¶22. In doing so, the Fund acknowledged that (1) the Settlement Agreement amended the CBA, and (2) the Fund was a third party beneficiary of both agreements.[1]

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[1] In fact, the Fund did not prevail on its breach of the Settlement Agreement claim because IES and TLG fully complied with the Agreement.

When a union settles a dispute in the NLRB, the NLRB settlement is not an "undisclosed side agreement" that the Fund can disregard. (*See* Petition, p. 15, and cases cited therein.) Instead, as with all decisions of the NLRB, its settlements must be enforceable against third parties – especially third party beneficiaries of the very agreement that is called into question. So when the Painters Union reached a settlement of its alter ego claim against IES and TLG, the NLRB settled any dispute concerning the CBA and alter ego claims up to the date of the Agreement. The courts cannot re-open the settlement and change it to suit the pension fund. Such an absurd result would mean that the NLRB could never reach a settlement as to any part of a labor dispute involving a CBA; pension funds deriving their fringe benefits from that same CBA could simply ignore the NLRB proceedings and sue for enforcement of the original CBA (as the Respondent Fund did here).

It is undisputed that the Painters Union could not pursue an alter ego claim against TLG and IES after entering into the NLRB settlement. Similarly, the Painters Union's related fringe benefit funds must be precluded from suing IES and TLG for alter ego after the NLRB sanctioned a settlement of the same claim brought by the union. Otherwise, the NLRB is stripped of all its power to render decisions or approve settlements of labor disputes.

If the Sixth Circuit's decision stands, no union could ever settle a dispute concerning any aspect of a CBA – including disputes over an employer's duty to bargain in good faith, the termination date of a CBA, or alter ego liability – because the related pension and welfare benefit funds could simply revert to the CBA

as they interpret it, regardless of the NLRB's resolution. A pension fund could ignore the NLRB's interpretation and press its case in district court to interpret the CBA as it stood before any NLRB involvement. The opportunity for inconsistent results concerning identical CBAs and employers is simply too great. This Court has cautioned that the federal courts' enforcement of CBAs must be "fashion[ed] from the policy of our national labor laws." *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 254 (1974) (quoting *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 456 (1957)). When Congress enacted the labor laws, it certainly did not intend to permit pension and welfare benefit funds to circumvent resolutions reached in the NLRB.

Other than the court below, the Fund cites no NLRB or district court case where a union reached an NLRB settlement and a related pension or welfare benefit fund was permitted to ignore the NLRB's resolution in pursuing a collection claim in district court. If the Sixth Circuit's decision is permitted to stand, a pension fund could enforce an older version of a CBA even though the union and employer modified the contract through NLRB proceedings.

In 1959, this Court set forth the standard for judicial deference to the NLRB:

> When an activity is arguably subject to §7 or §8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 245 (1959). The claim of alter ego status is an unfair labor practice claim, which falls within the exclusive jurisdiction of the NLRB. *See NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 578 (6th Cir. 1986) (Board's unfair labor practice charge of alter ego was violation of 29 U.S.C. §158(a)(5) and (1)). Otherwise, if courts are permitted to address alter ego claims brought by fringe benefit funds, inconsistent results will be reached, such as in the instant case.

> At times it has not been clear whether the particular activity ... was governed by §7 or §8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board.

Garmon, 359 U.S. at 244-45. The Painter's Union, recognizing the NLRB's exclusive authority, filed its claim for alter ego before the Board and not in federal court. Subsequent problems arose because the Fund filed the same alter ego unfair labor practice claim in federal court. As the NLRB has already resolved the alter ego claims against IES and TLG, courts cannot substitute their judgment for that of the NLRB and reach a different conclusion. The Complaint should have been dismissed.

Unfortunately, courts routinely permit fringe benefit funds to bring alter ego claims against employers. As such claims are actually unfair labor practice claims governed by §8 of the NLRA, 29 U.S.C.

§158, the unions should be the only parties permitted to bring such claims in the NLRB, not the funds suing for collection in the district courts. Otherwise, inconsistent results will be reached by the NLRB and the courts, as occurred here. The Petition should be granted to address this problem.

Respondent criticizes several district court decisions that explain why a union cannot circumvent its own settlement agreement. *See Cement Mason's Union Local No. 592 Pension Fund v. Zappone,* 501 F. Supp. 2d 714 (E.D. Penn. 2007), and *Rhode Island Carpenters Annuity Fund v. Trevi Icos Corp.,* 533 F. Supp. 2d 246 (D.R.I. 2008). In *Trevi Icos*, the court found that the fund was improperly pursuing claims against an employer at the union's behest. A union cannot skirt its own settlement agreement in the NLRB by convincing its related pension fund to re-sue an employer using identical allegations as those that the union just settled. The Respondent Fund has cited no case in which a pension fund was permitted to sue in federal court on an identical theory that the union previously settled in the NLRB.

Other cases cited by the Fund do not support its position. (*See* Oppo. Brief at 14-16.) In *Southwest Administrators, Inc. v. Rozay's Transfer,* 791 F.2d 769 (9th Cir. 1986), the Ninth Circuit found that a trust fund was not bound by an undisclosed oral "side agreement" between the union and the employer to forgive collection of fringe benefits for a nine-month period in the middle of the three-year CBA. The *Rozay's Transfer* settlement stated that it resolved all disputes between the parties arising out of an alleged unfair labor practice, but made no reference to trust fund contributions. *Id.* at 775. It also made no

reference to the oral side agreement to forgive nine months of fringe benefit obligations. The CBA executed simultaneously with the settlement expressly required contributions to the trust fund, including during the nine-month period that the union excused. *Id.*

In the instant matter, the NLRB Settlement Agreement required nonunion TLG to comply with the subcontracting provision of the CBA, thus amending the CBA and extending its reach to a nonunion company. In contrast to the NLRB settlement in *Rozay's Transfer*, the Settlement Agreement in the instant matter referenced both the Union's NLRB alter ego claim and the Fund's 2004 lawsuit seeking a comprehensive audit. The Fund was informed about and acquiesced to the Settlement Agreement and its terms, and the Fund even referred to the Agreement in the dismissal order for the 2004 lawsuit. Thus, the Settlement Agreement differs from the *Rozay's Transfer* settlement in two key components: (1) the Fund specifically acquiesced to it, even dismissing its own suit in reliance upon it, and (2) it modifies trust fund contribution requirements. RE.86-15. As such, the third party beneficiary Fund can be held to its terms. This Court should grant this Petition to correct the misperception that *Rozay's Transfer* stands for the proposition that the NLRB is powerless to interpret CBAs and that no pension fund can be bound to an NLRB resolution of a dispute concerning a specific CBA and a specific employer.

Respondent also cites the decision in *Bakery & Confectionery Union v. United Baking Co.*, 495 F. Supp. 170 (W.D. Pa. 1980), which is inapposite to the instant matter. The *United Baking Co.* settlement

specifically excluded any pension obligations; otherwise, the fund would have been bound by it and precluded from suit. In contrast, the instant Settlement Agreement settled pension fund obligations and required TLG to pay fringes in the event that it hired any nonunion painters after its execution. RE.86-15: ¶5.

Unfortunately, the Painters Union directed the Respondent Fund to pursue an alter ego claim against IES and TLG after the Settlement Agreement was executed. Robert Kennedy, who headed the Union, testified that he became angry upon realizing that the Settlement Agreement did not require IES to remain in the Union, so he instructed the Fund to seek a comprehensive audit of IES and TLG in order to recover for alter ego. App. 48a-49a. The Fund (half of whose Trustees are union signatory competitors of IES) is forbidden from ordering comprehensive audits without a Union request. App. 49a. Thus, the Fund never could have sought a comprehensive audit and sued IES and TLG unless the Union directed it to do so.

The Ninth Circuit reached its decision in *Southern California Retail Clerks Union v. Bjorklund*, 728 F.2d 1262 (9th Cir. 1984), cited by Respondent, because Congress sought to prevent the conversion of "simple collection actions ... into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions." *Id.* at 1265 (citing Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076-The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 44 (Comm. Print 1980)). Because the

NLRB Settlement Agreement sets forth the Fund's entitlement to contributions from TLG, it is directly relevant to the instant matter and should serve as a bar to the Fund's lawsuit.

II. The Sixth Circuit eliminated the "disguised continuance" standard set forth in *Southport Petroleum*.

Alter ego is a question of fact, but is based on a legal standard that varies from Circuit to Circuit. Even the Respondent disputes the district court's findings of fact and conclusions concerning the seven alter ego factors in this case. (*See* references throughout Oppo. Brief to facts beyond district court's opinion, RE.136.) The question for this Court is whether the Sixth Circuit can materially change the alter ego test to require only that two companies have some "similarity" in operations.[2] For it is undisputed that the district court below found that IES and TLG had separate equipment, management, ownership, and business purposes (App. 62a-63a), and only some similarity in customers (App. 64a), and supervision (because even though TLG had separate paid supervisors, Julian Llamas occasionally supervised TLG projects). (App. 63a) In upholding the district court, the Sixth Circuit's alter ego test no longer requires "substantial identicality" of the seven factors, but instead "some similarity" as to just a single factor, thus eliminating the disguised continuance

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[2] This reasoning would permit a court to find that two companies are alter egos if they have "some similarity" as to one factor. Under such reasoning, the U.S. Postal Service and McDonald's, which serve virtually every American, could be found alter egos because they have "some similarity" in their customer bases.

requirement. This Court should grant the Petition to reassert the disguised continuance rule as set forth in *Southport Petroleum v. NLRB*, 315 U.S. 100 (1942), and its progeny.

A. The alter ego test varies from Circuit to Circuit.

Contrary to the Fund's assertion, the Circuits do not consistently apply the same alter ego test as that used in the Sixth Circuit. Specifically, courts in the First, Fourth, Seventh, Ninth and Tenth Circuits do not use the NLRB rule or the seven-factor test. *See Mass. Carpenters Cent. Coll. Agency v. A.A. Bldg. Erectors, Inc.*, 343 F.3d 18, 21-22 (1st Cir. 2003) (First Circuit equity standard denies recovery to pension funds when no corporate change causes union to be in worse position); *Alkire v. NLRB*, 716 F.2d 1014, 1021 (4th Cir. 1983) (Fourth Circuit "reasonably foreseeable benefit" standard finds alter ego if employer obtains economic benefit at expense of statutory employee rights); *Trs. of Pension, Welfare & Vacation Fringe Benefit Funds v. Favia Elec. Co.*, 995 F.2d 785, 787 (7th Cir. 1993) (Seventh Circuit requires proof of unlawful evasion before assessing alter ego liability, and then uses five factor test); *J.M. Tanaka Constr., Inc. v. NLRB*, 675 F.2d 1029, 1033 (9th Cir. 1982) (Ninth Circuit uses four factor alter ego test); *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1470 (9th Cir. 1995) (Ninth Circuit evaluates whether nonunion entity is used in sham effort to avoid labor obligations rather than for legitimate business objectives); *NLRB v. Tricor Prods., Inc.*, 636 F.2d 266, 270 (10th Cir. 1980) (Tenth Circuit declares there is no hard and fast rule for determining alter ego).

However, these Circuits also struggle with adherence to the "disguised continuance" rule set forth by this Court in *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942). While each Circuit has different alter ego standards and tests, they have one thing in common: no other Circuit uses the Sixth Circuit's "any similarity" test. The Petition should be granted so that this Court can provide uniformity in the federal labor laws.

B. The labor laws are applied inconsistently.

Because the Circuits use a wide range of tests for alter ego, the federal labor laws are not being enforced consistently across the country. Alter ego liability largely depends on what Circuit the employer happens to do business inside. Indeed, if the facts of the instant case were analyzed in another Circuit, no alter ego liability would have been assessed.

In addition to the variety of tests used, courts do not know how to balance the factors they are considering. Many courts using either four-factor or seven-factor tests have pronounced that all factors do not need to be present and none are controlling. *Trafford Distrib. Ctr. v. NLRB*, 478 F.3d 172 (3d Cir.), *cert denied*, 552 U.S 818 (2007); *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 582 (6th Cir. 1986); *Trs. of Pension, Welfare & Vacation Fringe Benefit Funds v. Favia Elec. Co.*, 995 F.2d 785 (7th Cir. 1993), *J.M. Tanaka Constr., Inc. v. NLRB*, 675 F.2d 1029, 1033 (9th Cir. 1982); *Flynn v. R.C. Tile*, 353 F.3d 953, 958 (D.C. Cir. 2004). Rarely does a court know how to balance the factors that it considers. One exception is the district court in *Sheet Metal Workers International Ass'n v. Todd-Ford Management Co.*, No. SA-03-CA-

290-XR, 2006 WL 1044240 (W.D. Tex. Mar. 9, 2006). The *Todd-Ford* court considered whether each alter ego factor was met under the "substantial identicality" test, and concluded that, on balance, alter ego was inappropriate even though the two companies had substantially identical operations, customers and ownership. *Id.* at *13-*15. Petitioners would not be alter egos in that court.

Moreover, many courts ignore the question of whether the union or pension fund has sustained any harm from the transaction or transfer of assets. In fact, if no fringe benefits were unlawfully evaded, no alter ego liability can result. Absent evasion of labor obligations, there can be no "disguised continuance" or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations.

III. The Sixth Circuit effectively declared double-breasting illegal.

Contrary to the Fund's argument (Oppo. Brief, 20), the effect of the Sixth Circuit's decision is to declare double-breasting illegal within this Circuit. Double-breasted operations, in which the same owners conduct business through both a union company and a nonunion company, are no longer possible in the Sixth Circuit. Even though the CBA at issue did not forbid the owner of a signatory from also owning a nonunion company, this decision permits an alter ego finding if the two companies have "some similarity" as to one of the seven factors, including any similar ownership, management or supervision. Under the new "some similarity" test, no entities could ever operate legally as double-breasted. As such, the Sixth Circuit has

done what Congress refused to do – declared double-breasting illegal.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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